Case and Comment
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The Greatest American Lawyer

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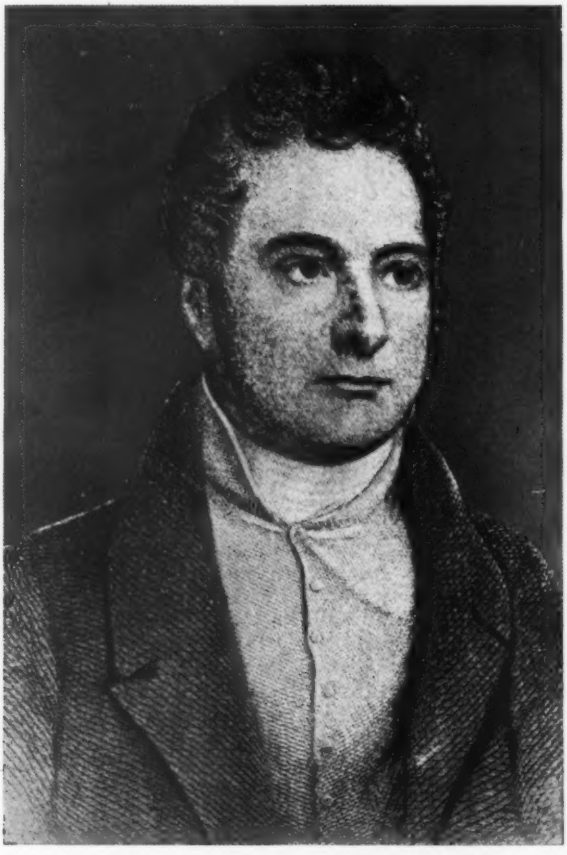
EVEN that tritest of truisms, the ephemerality of a lawyer's fame, offers no adequate explanation of the obscurity in which sleeps the genius of William Pinkney. For Pinkney was not merely a great lawyer. According to testimony that leaves no room for doubt or controversy, he was the very greatest lawyer that this country has ever produced. Nor was this all. He served his country with distinction and success in the labyrinths of diplomacy, at the Cabinet table, in the halls of Congress, and even on the field of battle. Above all, at a most critical point of our history, when the clamor of contending sections disturbed the tranquillity of the Sage of Monticello, "like a fire bell ringing in the night," to use Jefferson's own expressive phrase, it was Pinkney who rose to the occasion and recalled Senators to a sense of their duty and patriotism. This last fact alone, entirely disconnected from the splendor of his legal achievement, should have served to secure for Pinkney's name a place side by side with those of Clay and Webster. The explanation, therefore, must be sought elsewhere than in the proverb mentioned. The truth of the matter is that in the period prior to 1865 the ordinary historical perspective is confined to two events,—the revolution and the consequent founding of the Union, and the Civil War. Everything—and more especially everyone—not intimately and conspicuously connected with one of these events falls by the wayside. Pinkney was born too late to be identified prominently with the Revolution, and died too soon to become one of the leading actors in the compelling drama that, commencing in 1820, slowly but inevitably approached the grand climax of '61.

Pinkney has not been the only sufferer by reason of this condition. Thus complete forgetfulness veils the memory of Fisher Ames, who, when the efficacy of the Constitution hung as it were on a thread, by a single speech, of such logical depths and dazzling eloquence that his opponents claimed that it was unfair to put its subject to a vote immediately after its delivery, transformed a despairing minority in favor of the Jay treaty into a triumphant majority. But Fisher Ames, like Pinkney, like Gallatin, and many another patriot worthy of a better fate, has been buried in the valley of oblivion that lies between the twin mountains of the Revolution and the Civil War.

William Pinkney was born in Annapolis, Maryland, in March, 1764. His father was a Tory, and in consequence

most of the family property was confiscated during the Revolution. Young William, however, did not share his father's political convictions. On the contrary, as might be expected from a lad of spirit, he was an ardent patriot, and we are told that it was one of the most adventuresome pranks of his boyhood to escape his father's watchful eye and mount guard with the Continental soldiers in the fort at Annapolis. Notwithstanding the very apparent fact from our viewpoint that, if the legal profession can lay any claim to a small share in the proud boast of the clients of Calliope, Pinkney was a lawyer born, neither he nor his family seem to have recognized his talents in that direction, for they destined him to be a physician, and he actually began the study of medicine. Fortunately, however, he was rescued from the fate of "some mute inglorious Milton" by Samuel Chase, who, whatever may have been his faults as a judge, seems to have possessed a very generous heart and to have taken a keen interest in the welfare of young men. Having heard Pinkney take part in a de-



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WILLIAM PINKNEY.

bate he warned him that he was making a great mistake in not studying law instead of medicine, and volunteered to assist him in any possible way. The result of this incident was that Pinkney abandoned his medical studies, and turned to Coke and Blackstone. He was admitted to the bar in 1786, and must have enjoyed considerable success from the outset, as we find him taking to himself a wife in the same year. In 1788 he was elected to the state convention that ratified the Federal Constitution; and from 1788 to 1792 he was a member of the house of delegates. This part of Pinkney's career is chiefly noteworthy for a somewhat florid, but very sincere and manly speech, made against a proposal to limit the manumission of slaves. All his life Pinkney was personally opposed to slavery, and it speaks eloquently of his courage and ideals that, living as he did in a slave-holding state, he should at the very outset of his career so frankly avow his sentiments on the subject. This is the speech that years later Sumner praised as "of earnest, truthful eloquence,—better for his memory than even his professional fame."

From 1792 to 1795 Pinkney was a member of the executive council, and in the latter year he was again a member of the house of delegates. Pinkney's whole life is so replete with political honors that one might well wonder when he found time to practise law. But it must be borne in mind that in the early days of the Republic, and indeed for many years thereafter, the private practice of law and the holding of political preferments were not deemed incompatible. During this very period, and during, in fact, every phase of his public life in this country, Pinkney was engaged continuously in the private pursuit of his profession. Thus in volume 7 of Harris & McHenry's early Maryland reports, which covers a portion of the years under consideration, Pinkney appears in twenty-three cases. His argument in the case of Martindale v. Troop, 3 Harr. & McH., 270, seems to have attracted no little interest and attention, the reporter giving to it forty-six pages of the printed record. The point involved in the case, however, is probably of more historic than practical value today, being whether adverse possession for more than twenty years against a tenant in tail barred the issue of such tenant. Pinkney maintained the affirmative of the proposition, and his contention was sustained by the court.

The year 1796 proved an eventful one in Pinkney's life. By one of the articles of the Jay treaty, a commission was created to determine the claims of American merchants against the English government for illegal captures. Pinkney was offered one of the commissionerships. After some hesitation he accepted. The duties of his post demanded residence in London, and so for the eight years from 1796 to 1804 Pinkney lived in self-imposed exile. Often, during this time, he fretted against the drudgery of his office, and longed for the excitements of the forum. But, as has been well said, these eight years in London were invaluable to him. The decision of the questions, which came before the tribunal of which he was a member, thoroughly acquainted him with the law governing domicil, contraband, blockade, jurisdiction, interpretation of treaties, practice in prize courts, and many other complex and, in those days, exceedingly important phases of the law. The calm and dispassionate tone appropriate to judicial opinions moderated his too exuberant style. During his leisure moments he listened to Erskine, and to Pitt and Fox, and to the other giants of that fortunate age. Indeed, everything during his stay in the British capital conspired both to induce and accentuate that breadth of view, extensive knowledge, and felicity of expression that, upon his return to his native land, soon placed him at the head of the American bar. There is one anecdote connected with this sojourn in England that demands special relation because of the light it throws on Pinkney's character. Being present on one occasion at a dinner where had assembled some of the choicest spirits of the time, the conversation drifted to a certain doubtful passage in Euripides. One guest after another advanced some theory or opinion in the effort to elucidate its meaning. Finally, noting Pinkney's silence, one of the

guests called upon him for an expression of his views. Now, the confiscation of the property of Pinkney's father had necessarily curtailed his son's classical education, and Ben Jonson's line, "He knew little Latin and less Greek," was very apposite in his case also. What meager store he had acquired in his school-boy days had been harshly dealt with by time; and consequently, to his ineffable mortification, he was forced to confess his deficiencies. Resolved, however, that the repetition of such an incident should be impossible, Pinkney at this late day, in the midst of all his other labors, turned with such zeal and ardor to the study of the classics that in a short time he became a proficient classical scholar.

In 1804 Pinkney returned to America, disclaiming, in a letter to a friend, any desire for further office, but announcing his desire to be "a mere professional laborer." He threw himself into the practice of his profession with renewed energy and enhanced prestige. In 1806 he argued his first case in the Supreme Court of the United States.

Says Mr. Warren in his History of the American Bar: "After the argument of his first case in the Supreme Court, in 1806, another Maryland lawyer, William Pinkney, stepped to the front, where he remained until his death in 1822,—the undisputed head of the American bar."

He had previously, in 1805, been appointed attorney general of Maryland, the appointment, however, interfering with his regular practice only to the extent of preventing him from appearing against the state.

However much Pinkney may have wished to be "a mere professional laborer," he was not destined to be long gratified in his desire; for in 1806 Jefferson requested him to serve as a special minister to England to assist Monroe in arriving at some acceptable understanding with that very haughty and high-handed power. The Napoleonic Wars had transformed Europe into an armed camp; and a neutral flag received scant courtesy from any of the belligerents. Moreover, England claimed the right to search our vessels; and, to the righteous indignation of every true American, impressed our seamen. The Chesapeake outrage clamored for reparation. Such were the salient outlines of the difficult and delicate situation Pinkney was called upon to assist in handling. Shortly after his arrival in London, Monroe returned to America; and Pinkney remained as resident minister until the fateful and pregnant day in February, 1811, when, pursuant to President Madison's instructions, he demanded his audience of leave, being the only American minister to Great Britain whose departure has been the signal for war. In his history of the United States, Henry Adams gives a very graphic description of these five years spent by Pinkney as our representative at the Court of St. James. Says that most exacting and critical of historians: "So closed Pinkney's residence in London. He had passed there nearly five years of such violent national hostility as no other American minister ever faced during an equal length of time, or defied at last with equal sternness; but his extraordinary abilities and character made him greatly respected and admired while he remained, and silenced remonstrance when he left. For many years afterwards his successors were mortified by comparisons between his table oratory and theirs. As a writer he was not less distinguished. Canning's impenetrable self-confidence met in him powers that did not yield, even in self-confidence, to his own; and Lord Wellesley's oriental dignity was not a little ruffled by Pinkney's handling. As occasion required, he was patient under irritation that seemed intolerable, as aggressive as Canning himself, or as stately and urbane as Wellesley; and even when he lost his temper he did so in cold blood, because he saw no other way to break through the obstacles put in his path. America never sent an abler representative to the Court of London."

Almost immediately after his return, Pinkney was elected to the Maryland senate, and in December, 1811, he accepted the Attorney Generalship of the United States. In those days the Attorney General was barely regarded as a Cabinet officer. It remained for Wirt to give to that position its proper dignity.

Pinkney did not even take up his residence in Washington, but continued living and practising in Maryland and going to the national capital only when official or legal business required. It is interesting to note, however, that his was the hand that drew the declaration of war against Great Britain, which Madison signed and proclaimed. In January, 1814, a bill was introduced into the lower House of Congress requiring the Attorney General to reside at the capital. It was not even favorably reported by the committee to which it was referred, but so sensitive was Pinkney's sense of honor that he could not endure the slightest doubt or question as to the propriety of his course of action; and consequently, to Madison's keen regret, he resigned the Attorney Generalship. When, later in the same year, the British army under General Ross approached Baltimore, Pinkney raised a volunteer company to oppose its progress, and was severely wounded at the battle of Bladensburg. He soon resumed, however, the more peaceful pursuits of his profession. His assiduity and the general appreciation of his leadership is forcibly demonstrated by the fact that he appeared in just half of the cases reported in 8 Cranch. This period of his busy life is principally remarkable, as far as his legal career is concerned, for his celebrated argument in the case of The Nereide. A Mr. Pinto, of Buenos Aires, being in London in 1813, chartered an armed ship to carry his goods home. The vessel sailed under British convoy, but, having become separated from its escort, was captured and taken to New York. Pinkney contended that the cargo should be confiscated because the chartering of the armed vessel of an enemy by Pinto had identified his commerce with that of the hostile power. It was in this connection that he employed that powerful figurative passage wherein, ridiculing the opposite "notion," among other similes he likened The Nereide to a centaur, "the lamb and the tiger portentously incorporated" a modern Amazon with her voice composed of the tremendous shout of the Minerva of Homer, and the gentle accents of the shepherdess of Arcadia, and ended with saying: "Nay, if I may be allowed so bold a figure in a mere legal discussion, we shall have the branch of olive entwined around the bolt of Jove, and neutrality in the act of hurling the latter under the deceitful cover of the former." The effect of this eloquent passage was not to gain a favorable decision of the court, but to rouse the Chief Justice to put on record the impression created by it,—a distinction much rarer at his hands than the former. In his opinion in 9 Cranch, at page 430, 3 L. ed. 782, occurs this language with reference to it: "With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure composed of the most discordant materials of Peace and War. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought to belong to those who sit on this bench, to discover its only imperfection,—its want of resemblance."

Though not gaining that which to a lawyer is incapable of compensation, a favorable decision, Pinkney, in addition to the handsome compliment wrung from Marshall's pen, had the consolation of carrying with him the member of the court who by common voice was credited with being as superior to the remainder of the court in knowledge of maritime jurisprudence as Marshall was in mastery of constitutional law. Story dissented in an opinion whose perusal can hardly fail to induce the conviction that it contains both the law and the common sense of the matter. It is interesting to note that in this case Pinkney was opposed by Emmett, that illustrious bearer of an illustrious name, who, forced to turn his back on the land of his birth, had sought refuge on the foreign strand that has afforded protection to so many of his race, and by dint of ability alone had securely established a place second to none at the New York bar. The first encounter of these well-matched antagonists moved Judge Story to write:

"Mr. Pinkney and Mr. Emmett have measured swords in a late cause. I am satisfied that Mr. Pinkney towers above

all his competitors. Mr. Emmett is the favorite counselor of New York, but Pinkney's superiority, to my mind, was unquestionable. I was glad, however, to have his emulation excited by a new trial. It invigorated his exertion, and he poured upon us a torrent of splendid eloquence."

In January, 1816, Pinkney was elected to the national House of Representatives. His reputation and abilities made him by far the most noteworthy figure in Congress. He served, however, only a few months of his term. Nevertheless, he had an opportunity to deliver a very important and effective speech. In 1815 a commercial compact with Great Britain had been ratified by the Senate. Thereupon a bill was introduced into the House to carry its provisions into effect, on the pretext that a treaty relating to commerce came under the jurisdiction of that body as well as of the Senate, since authority to regulate commerce was given to Congress. Pinkney opposed this heresy in a speech of great force and eloquence, which compelled the attention both of the House and the nation, and which, moreover, was completely successful in its object.

In April Pinkney resigned from the House to become special minister to Naples, in the effort to obtain from that government reparation for seizure of American goods during the reign of Murat. His acceptance came as a great surprise to his friends, since it meant the temporary relinquishment of his lucrative law practice as well as of his enviable position in Congress. He thus explained his action, however, to one of his correspondents: "There are those among my friends who wonder that I will go abroad, however honorable the service. They know not how I toil at the bar; they know not all my anxious days and sleepless nights. I must breathe awhile; the bow forever bent will break. Besides, I want to see Italy; the orators of Britain I have heard, but I want to visit that classic land, the study of whose poetry and eloquence is the charm of my life."

His high expectations of Italy, however, must have been sadly disappointed, for we find him writing to Monroe in October: "The much vaunted sky of Italy appears to me (thus far) to be infinitely inferior to that of Maryland. Everything here has been overrated by travelers except the bay of Naples, and the number and clamorous importunity of common beggars, and the meanness of beggars of a higher order, which it is absolutely impossible to overrate. After all, our country gains upon our affection in proportion as we have opportunity of comparing it with others."

Perhaps the unsuccess of his mission had something to do with this complaining strain, for Pinkney found scant encouragement at the Neapolitan court. In recognition of the hopelessness of the situation there, Pinkney was commissioned Minister Plenipotentiary to Russia instead. About the only thing, however, we know of his residence at St. Petersburg is a little incident related by one of his attachés, which illustrates the weaker side of his character. Pinkney always posed and dressed as a gentleman of fashion, although, as has been well pointed out in defense of the charge of foppishness so frequently preferred against him, he only conformed in this regard to the practice and custom of those with whom he had to associate during his many years of diplomatic service. Being invited to an audience with one of the Russian princesses, he arose at eight o'clock, vehemently remonstrating against the outrage of compelling an American citizen to arise at such an early hour "to wait on a mere child." He was at once reminded that the audience was not until eleven o'clock, whereupon he replied with crushing finality: "I know, but what gentleman can dress in less than three hours!"

In 1818 Pinkney resigned forever his diplomatic labors, and, in a letter to Monroe, declared his unwillingness to serve as a minister to England, saying, in words very similar in sentiment and expression to those already quoted on a like occasion: "It is my desire to be a mere lawyer." The four years that intervened between Pinkney's return from Russia and his demise form the most important period of his life, both legally and politically. To it belong his matchless argument in the momentous case of McCulloch v. Maryland, and his magnifi-

cent speech on the Missouri question in the United States Senate, in which body he took his seat early in 1820. The case of McCulloch v. Maryland looms great in the annals of the law, not merely because of the magnitude of the issue, but also because of the eminence and ability of the counsel on the contending sides. Indeed, it is safe to say that never before or since in this country has there been such an array of genius and learning in a single cause,—Pinkney, Webster, and Wirt for the bank, Luther Martin, Hopkinson, and Jones for the state of Maryland. To be pre-eminent in such company should have been a distinction more enduring far than a monument of brass. Yet it was acknowledged on all sides that Pinkney's speech, covering as it did three days, was the masterpiece of the occasion, making the arguments of Wirt and Webster seem tame by comparison. Justice Story seems to have expressed the common opinion of all when he said of it: "I never in my life heard a greater speech. It was worth a journey from Salem to hear it. His elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a statesman and a patriot and a sound constitutional lawyer." The line of argument developed by Pinkney in his speech was precisely that adopted by Marshall in his opinion. Pinkney himself was keenly aware of the importance of the occasion, and stated it in a sonorous period not easily surpassed in force and splendor. "It is not merely," he said, "that it may stabilitate or pull down a financial or commercial institution called a bank,—however essential such an institution may be to the government and country. I have a deep and awful conviction that upon that judgment will mainly depend whether the Constitution, under which we live and prosper, is to be considered, like its precursor, a mere phantom of political power to deceive and mock us, a pageant of mimic sovereignty calculated to raise up hopes that it may leave them to perish, a frail and tottering edifice that can afford no shelter from storms either foreign or domestic, a creature half made up, without heart or brain or nerve or muscle,—without protecting power of redeeming energy, or whether it is to be viewed as a competent guardian of all that is dear to us as a nation."

But he had supreme confidence in the issue, for already he had remarked: "I meditate with exultation, not fear, upon the proud spectacle of a peaceful review of these conflicting sovereign claims by this more than amphictyonic council. I see in it a pledge of the immortality of the Union, of a perpetuity of national strength and glory, increasing and brightening with age; of concord at home and reputation abroad."

Such a victory might well have been the crowning triumph of a life in which the honors and distinctions conferred on the individual walked hand in hand with services and benefits repaid the nation. But the closing scene was reserved for another arena. In the very midst of that peace and freedom from partisan wrangles that had bestowed on the Monroe administration the epithet "the era of good feeling," suddenly there burst forth in the halls of Congress a conflict so fierce and mighty that of it Seward remarked in the next generation, "the Union reeled under its vehemence." Missouri, with the virile confidence of the lusty West, knocked loudly and insistently at the doors of Congress, demanding admission as a state. But Missouri countenanced slavery! Instantly from its long slumber upreared the many-headed hydra of sectional animosity, breathing hate and defiance from every nostril with redoubled vigor. The North could not covenant with sin! The South would brook no interference with its domestic institutions! The Tallmadge amendment, which, as a condition upon its admission to the Union, prohibited the further importation of slaves into Missouri and provided for gradual abolition, was adopted by the House. The real battle, however, came in the Senate, where slave and free states were equal in number and consequently in representation. Maine likewise was seeking admission. But Missouri, a slave state, must accompany Maine, a free state, or neither should be admitted,—such was the Southern ultimatum. So the balance

hung even, with no prospect of an early, or indeed any, settlement at all.

In such a case the eyes of all naturally became fixed on Pinkney as the most distinguished man in Congress and concededly the greatest lawyer in the country. Pinkney, it is true, represented a slave state. But personally he was not in favor of slavery. Moreover, he was robustly national in his views, having referred in his McCulloch argument to the "miserable state jealousies which attended like malignant influences the birth of the Constitution, and have since dogged the footsteps of its youth." Under such circumstances his words were bound to have the greatest weight.

Within the short space of a month Pinkney delivered two speeches in support of the Southern position. During the early years of Congress the speeches of its members were reported only when they themselves furnished the notes. Through Pinkney's failure to do so in the case of his first speech we have no other evidence than tradition, either of its contents or power. We are told that, when it became known that Pinkney would speak, the Senate floor and galleries were crowded to their capacities, while the lobbies and corridors of the Capitol were overrun by disappointed spectators. Diplomats and Cabinet officers lent distinction to the audience. The House adjourned early, so that its members might have an opportunity to hear the great Marylander. It was such a concourse and such an occasion as might have lent additional fervor and intensity to the words of a Burke impeaching the oppressor of India, and have inspired the pen of a Macaulay to limn the scene in rhetoric of deathless splendor. Benton in his "Thirty Years in the Senate" seems to voice the contemporary judgment of his speech when he writes: "It was the most gorgeous speech ever delivered in the Senate, and the most applauded."

The greater portion of Pinkney's second speech, which as an oration was deemed somewhat inferior to his first, has, fortunately, been preserved. In it Pinkney discusses the question of Missouri's admission almost entirely from a legal standpoint. With impatient gesture, he brushed aside the denunciations of slavery so freely indulged in by the Northern members, saying that the question was not on the iniquities of slavery, but on the power of Congress. He took the broad ground that Congress could refuse to admit Missouri, but if it did grant admission, then Missouri must enter the Union as a state equal in every respect to each of the original thirteen,—Massachusetts must enjoy no right which Missouri could not exercise. If Massachusetts could establish and maintain slavery, and no one denied but that it could, then Missouri could not be deprived of the same power as the price of its admission. The Constitution, it is true, said Congress may admit new states into the Union; but into what Union? The original Union—"an equal Union between parties equally sovereign." "If it comes in shorn of its beams," strenuously asserted Pinkney, "crippled and disparaged beyond the original states, it is not into the original Union that it comes. For it is a different sort of Union. The first was *inter pares;* this is a Union between disparates, between giants and a dwarf, between power and feebleness, between full proportioned sovereignties and a miserable image of power." This bold outline of his argument shows its force and unescapable logic. Small wonder that Senator King of New York, who led the fight for the North, confessed that all during its delivery he could not help feeling that he was wrong. As a matter of fact such was actually the case, for in the Oklahoma Capital case, decided in 1911 and reported in 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688, the Supreme Court squarely upheld the contention made almost a century before by Pinkney, Mr. Justice Lurton, who wrote the opinion, succinctly stating the proposition that "when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and such powers may not constitutionally be diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would

not be valid and effectual if the subject of congressional enactment after admission."

The very next day after his second speech, the measure was offered, which, after much opposition and discussion, took final shape as the famous Missouri Compromise, whose repeal some thirty years later called into existence the Republican party.

Pinkney was a member of the conference that accomplished this compromise, and proposed the report that was made.

The remaining years of Pinkney's life were spent mainly in the practice of his profession, although he retained his seat in the Senate. He participated in the argument of the very important case of Cohens v. Virginia, which solidly established that where a Federal question was involved, the appellate jurisdiction of the Supreme Court embraced the review of a decision of the highest tribunal of a state.

In the great cause of Gibbons v. Ogden he was retained with Emmett to uphold the validity of the New York legislation granting Fulton and Livingston the exclusive navigation by steam of all the waters in the state,—legislation so acutely felt and bitterly resented by the neighboring states of Connecticut and New Jersey that counsel for Gibbons, in arguing the case, could assure the Supreme Court that the three states were on the eve of war. Although appearing of counsel when the case first came before the Supreme Court, Pinkney was denied the opportunity of presenting to that body his views on the great questions involved; for it was dismissed on a point of practice, and before it again reached that high tribunal he had fallen a martyr to his own unflagging and astonishing industry.

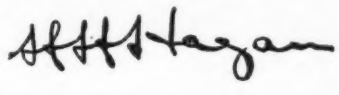
On February 25, 1822, the country was shocked to hear that the great orator, lawyer, and statesman was no more. His death, at a comparatively early age, was by everyone attributed to overwork. The lofty place he held in the estimation of his countrymen is well illustrated by the words of John Randolph, surely a man as little inclined to fulsome compliments as any that ever lived, in announcing his death to the lower House of Congress, "There has been a Homer," said the master of Roanoke, "there has been a Shakespeare; there has been a Milton; there has been a Newton; there may be another Pinkney, but there is none now." The same fact is strikingly attested by an incident of the proceedings held by the Supreme Court in Pinkney's memory and honor, whereby it was ordered to be entered on the minutes of the court that "the judges have determined, as a mark of their profound respect for his character and sincere grief for his loss, to wear crape on the left arm for the residue of the term."

No man ever possessed more avidity for fame and honor than Pinkney; no man ever sought "the bubble reputation" more unceasingly. It was, however, the present, not the future, enjoyment of them that appealed to him. In the words of Taney, "he would not have bartered a present enjoyment for a niche in the temple of fame." He once expressed a wish not to live a moment after his ascendancy at the bar was questioned, a sentiment that has led a writer, of what the present Speaker of the House once aptly styled the "New England School of History," to intimate that the encroaching genius apparent in the Dartmouth College argument may have reconciled Pinkney to death, an intimation that will cause a smile among those who recollect the consternation created among the friends of the college by the opposition's retention of Pinkney to reargue that cause, and how even John Marshall, fearful that the concurrence of his associates, which by the cleverest of maneuvering he and the trustees of the college had obtained, might be endangered, hastened to deliver his opinion with Pinkney in the court room seeking reargument.

Pinkney's fame has undoubtedly suffered from the accentuation by most writers of a number of small imperfections,—foibles, Randolph correctly termed them. That he was intensely vain may be true,—vain even of his vanity, as someone has said. But it must not be forgotten that the same vanity that led him to wear amber colored gloves when he made an argument also prompted him never to speak without

thorough preparation, so that finally through it he attained the leadership of the American bar. One can forgive his foppishness in dress when it is remembered that it and the argument in McCulloch v. Maryland had a common source. It may have been difficult for Pinkney to acknowledge another's superiority in any matter, but out of this very mental difficulty arose the strength to renew the study of the classics at the age of forty, because he found himself less familiar with them than some of his friends. His unwearied energy, as Taney puts it, has several times been referred to. To such an extent was it carried that it is narrated that he had his coach fitted up with book shelves, and always carried with him a select legal library, so that the time consumed in going from Annapolis to the court at Baltimore or the Supreme Court at Washington might be profitably spent. Indeed, the whole splendid structure of Pinkney's achievement arose out of the same impulses as the "foibles" which some have so unduly criticized or ridiculed

A man's life and his place in history should be tested on a broad and liberal scale. Small faults should never be permitted effectively to dim the luster of large virtues. Tested by such a standard, Pinkney's character and career must both be placed high. That he loved his country, despite the fact that that country had confiscated his father's property, is proved by the ringingly patriotic tone not only of his every public utterance, but of his private letters as well, and, most of all, by those five years of vexations and slights he spent as minister to England, when, with unruffled and truly admirable dignity, he sustained nobly and well the honor of his country, notwithstanding the constant shafts of hate and petty spite and the belief voiced by his correspondence that he was thereby forever surrendering any hope of earning a competence for his family. That he possessed moral courage is proved by his bold disapproval of slavery in a state where that institution flourished. That he had physical courage Bladensburg testifies. That he had the broad vision and bold grasp of statesmanship is attested by his magnificent argument in McCulloch v. Maryland. That he boasted the gift of oratory in a high degree is confirmed by the unanimous verdict of his contemporaries that he stood in his day without a rival, a day that included no small part of the public life of Clay, Calhoun and Webster. That in the space of a professional life of thirty-six years, fifteen of which were spent abroad in the service of his country, he established a reputation as a lawyer without a peer in this country, rests on evidence too overwhelming to be disputed. Of him John Marshall said that he was the greatest man he had ever seen in a court of justice. Of him Taney wrote in 1854: "I have heard almost all the great advocates of the United States, both of the past and present generation, but I have seen none equal to him." Of him Story remarked: "His clear and forcible manner of putting his cases before the court, his powerful and commanding eloquence, occasionally illumined with sparkling lights, but always logical and appropriate, and, above all, his accurate and discriminating law knowledge, which he pours out with wonderful precision, give him, in my opinion, a great superiority over every man whom I have known." When such a court unanimously concurs in rendering judgment, bold indeed the man who claims an appeal.



Daniel Webster, The Constitutional Lawyer

BY EVERETT P. WHEELER

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DANIEL WEBSTER was the one man in American history to whom, during his lifetime, the epithet of godlike was applied. In his case it excited no surprise. In form and feature he was like a god. The divinest of divine qualities is creative power, and that he possessed to a degree unsurpassed among lawyers. He said himself of Alexander Hamilton, "He smote the rock of the national resources, and abundant streams of revenue gushed forth." It may justly be said of Webster that he touched the constitutional framework the fathers constructed, and gave it life and expansiveness, so that it has continued to be adequate for the growth of the nation.

First among the nations we established a written constitution which should be the supreme law of the land, supreme over executive and legislature, and gave to the courts of justice the power to enforce its supremacy by declaring that a statute which had received the votes of both Houses of Congress and the signature of the President should be held to be *ultra vires* if it violate this supreme constitution. In the exercise of this power the Judges represent the People and enforce the will of the People as expressed in[1] the Constitution which they have adopted.

It was because Mr. Webster, in his capacious mind, apprehended with such clearness the idea which was the soul of the system our fathers established, that he was able to lead our courts to formulate this idea in their judgments.

But, it may be asked, how can this be? Is it not the duty of judges to declare, and not to make, the law? In one sense no doubt it is. The judge ought not to depart from the principles of the law as he finds them established. But cases often arise which involve a new application of these principles to facts, for which no precise provision has been made. In such cases the judge does, in a very real sense, make the law. The lawyer who presents the case to the court should thoroughly understand the existing rule and the reason for it. He must appreciate the change in circumstances and conditions which requires an expansion of the rule, and must possess constructive ability and the gift of utterance, so as to show how the rule may be developed and meet the requirements of the present and the future.

No man in America ever combined these qualities to a higher degree than Webster. He understood the history and character of the mother country and the common law, which was the expression of that character and history.

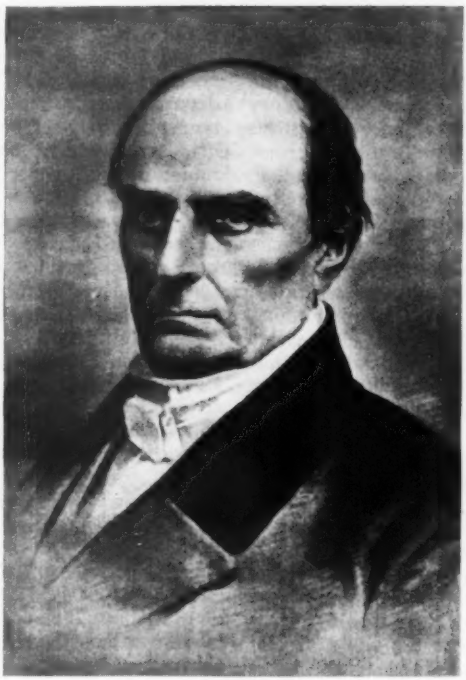
He was born in Salisbury, New Hampshire, January 18, 1782, just before the treaty of peace was concluded between the thirteen Colonies and Great Britain. His father had been a distinguished officer in the Revolution, had smarted under the weakness and incompetence of the Confederation, and realized the necessity for a united and stable government. Webster grew up when the Constitution was in the making. He was impressed with the conviction that he was a citizen of a nation. As he said himself in the debate on the Force bill, in 1833:[1]

"The Constitution regards itself as perpetual and immortal. . . . It declares that new states may come into the Union, but it does not declare that old states may go out. The Union is not a temporary partnership of states."

[1] Webster's Works, vol. 3, p. 471.

This conviction he impressed on the great majority of his fellow citizens in the Northern states, and upon no small part of the Southern people. This conviction carried us through the Civil War. Without it success would have been impossible.

Mr. Webster was admitted to the bar in Boston in 1805. In the same year he opened an office in New Hampshire, near his father's home, where he remained until his father's death. In 1807 he went to Portsmouth, N. H. In 1812 he was elected to Congress, and in 1814 was admitted to the bar of the United States Supreme Court. He spent his life in the service of his country, and died at his home in Marshfield, in October, 1852. The first appeal of real importance he argued in the Supreme Court was Pawlet v. Clark.[2] In this he satisfied the court that the clause of the Constitution which extended the judicial power to controversies between citizens of the same state claiming land under grants of different states included not only the states which formed the Constitution, but states subsequently admitted.



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His next argument of great importance is Dartmouth College v. Woodward.[3] No doubt the effect of this case has been limited by constitutional amendments which have reserved to the legislature the power to amend charters, but the principle of the decision that of enforcing constitutional guaranties for the protection of vested rights—remains in full vigor, and has been not only a safeguard, but an important element in the growth and prosperity of the American people. Wretched, indeed, is the condition of any nation in which the peaceful citizen cannot enjoy in security the fruits of his honest labor. No system of government can justly be called a republic which does not secure to all its citizens, whether rich or poor, whether engaged in individual enterprises or united with others in partnership or corporation, the protection of the law for their lawful business. The danger in every democracy has been that in times of popular excitement this principle will be forgotten, and that the property acquired by industry and intelligence will be confiscated, wholly or in part, for the benefit of the idle and improvident. With us it is otherwise. The people of this Republic are sovereign, but they are a constitutional sovereign. Their monarchy is a limited monarchy. They have freely chosen to limit their own power and the power of their representatives by constitutions, which they justly hold sacred. They have intrusted to the courts of justice, which the tradition of our race leads us to revere, the power of enforcing the mandate of the Constitution.

[2] 9 Cranch, 292, 3 L. ed. 735.

[3] 4 Wheat. 518, 4 L. ed. 629.

In the Supreme Court of New Hampshire, Chief Justice Richardson had said, in the Dartmouth College Case:

"How a privilege can be protected from the operation of the law of the land, by a clause in the Constitution declaring that it shall not be taken away but by the law of the land, is not very easily understood."

In opposition to this doctrine of the court below, Webster argued in the Supreme Court:

"The power of the lawgiver is limited and defined; the judicial is regarded as a distinct independent power." [4]

"That the legislature shall not judge by act, it shall not decide by act, it shall not deprive by act, but it shall let all these things be tried and judged by the law of the land.

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land." [5]

The decision of the court followed Mr. Webster's argument closely.[6]

As has been said, legislatures have been authorized by constitutional amendments to reserve the power to amend or repeal charters, but the courts have held, notwithstanding these amendments, that rights acquired by virtue of a charter, and which have become vested in a corporation by the legitimate use of the powers granted, cannot be taken away without compensation.[7]

The next case of great importance argued by Mr. Webster before the Supreme Court was M'Culloch v. Maryland.[8] This case involved a consideration of the character of the Constitution, and whether it was the duty of all branches of the government to deal with it as an instrument containing general grants of power for the purpose of endowing the new central government with ample authority for all its needs, or whether it should be considered as a bargain between independent states, in which each desired to retain as much power as possible, and was unwilling to admit that anything not strictly "nominated in the bond" was included.

At the second session of the First Congress, a national bank had been chartered. The charter expired in 1811, and was not renewed. In 1816 the second bank of the United States was incorporated by Congress. It was authorized to establish branches in the different states, and did establish a branch in Baltimore. The state banks found its competition embarrassing, and the state of Maryland passed an act taxing the branch bank. The cashier was convicted of a violation of provisions of the Maryland law. Its validity was sustained by the Maryland courts, and the case was taken by the bank to the Supreme Court. Webster was one of the counsel for the plaintiff in error. He maintained the famous proposition "that an unlimited power to tax involves necessarily a power to destroy." [9] The state of Maryland, in the discussion, disputed the power of Congress to charter a national bank. Webster stated the argument for the power thus: [10]

"Congress, by the Constitution, is invested with certain powers; and as to the objects and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the Constitution empowering Congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies a grant of all usual and suitable means for the execution of the powers granted."

In this case also the Supreme Court followed Webster's argument closely. Indeed, the Chief Justice, at page 431 of the report, quoted his language, "that the power to tax involves the power to destroy." [11]

The greater part of the banking business of the country is now carried on by

[4] Webster's Works, vol. 5, p. 486.
[5] Webster's Works, vol. 5, p. 486.
[6] 4 Wheat. 585–644, 4 L. ed. 646–661.
[7] Miller v. New York, 15 Wall. 478, 21 L. ed. 98; People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.
[8] 4 Wheat. 316, 4 L. ed. 579.
[9] Webster's Writings and Speeches, vol. 15, p. 256.
[10] 4 Wheat. 323, 4 L. ed. 581; Webster's Writings and Speeches, vol. 16, p. 62.
[11] This famous phrase of Webster's was re-

national banks. Anyone who remembers (as the author does) the contrast between this orderly and well-regulated financial condition and the chaotic state of our currency before the Civil War, will appreciate the incalculable value of the service rendered the country by Webster in the masterly argument which led the court to this conclusion.

Shortly after the decision of M'Culloch v. Maryland, Webster argued Gibbons v. Ogden.[12] The state of New York had granted to Robert Fulton and Robert R. Livingston a monopoly of the use of the steamboat which Fulton had invented, for thirty years. The law forbade any person to navigate the waters of New York with any steamboat without a license from Livingston and Fulton. Thomas Gibbons determined to challenge this monopoly, and built a ferryboat which traded between Elizabeth, New Jersey, and New York city. Ogden, who had a grant from Livingston and Fulton, filed a bill in the New York chancery to restrain Gibbons from using the boat. The New York courts held that the statute of New York was valid, and Gibbons took the case to the United States Supreme Court. Meanwhile other states had retaliated. Connecticut had passed a law that no person having a license from Livingston and Fulton should enter the waters of the state of Connecticut with a steam vessel. New Jersey had passed a statute giving any citizen of New Jersey who was restrained from using steam in New York waters an action for damages in New Jersey, with treble costs.

Mr. Webster argued that all such acts were inconsistent with the Constitution; that the power of Congress to regulate commerce was complete and entire, and to a certain extent necessarily exclusive. To quote from his argument:

"Nothing is more complex than commerce; and in such an age as this, no words embrace a wider field than *commercial regulation*. Almost all business and intercourse of life may be connected incidentally, more or less, with commercial regulations. But it is only necessary to apply to this part of the Constitution the well-settled rules of construction. Some powers are held to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the states to exercise similar powers; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the court has adjudicated many important questions; and the same mode is proper here. And, as some powers have been held to be exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively; so where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction will be to consider of what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set up in this case, under the laws of New York, is a monopoly. Now I think it very reasonable to say, that the Constitution never intended to leave with the states the power of granting monopolies, either of trade or of navigation; and therefore that as to this the commercial power is exclusive in Congress.[13]

"It is in vain to look for an exact and precise definition of the powers of Congress on several subjects. The Constitution does not undertake the task of making such exact definitions. In conferring powers, it proceeds by the way of enumeration, stating the powers conferred, one after another, in few words; and where the power is general or complex in its nature, the extent of the grant must necessarily be judged of and limited by its object, and by the nature of the power."[14]

"The people of New York have a right to be protected against this monopoly. It is one of the objects for which they agreed to this Constitution, that they should stand on equality in commercial regulations; and if the government should not insure them that, the promises made to them in its behalf would not be performed."[15]

In this case also the argument of the court follows closely that of Mr. Webster, and adopts his fundamental propositions. To use the language of Mr. Justice Wayne, who heard the argument:

"The court felt the application and force of your reasoning, and it made a decision releasing every creek and harbor, river, and bay in our country from the interference of monopolies, which had already provoked unfriendly legislation between some of the states, and which would have been as little favorable to the interests of Fulton as they were unworthy of his genius."

peated by Mr. Justice Brewer in Fairbank v. United States, 181 U. S. 283, 291, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 5 Am. Crim. Rep. 135.

[12] 9 Wheat. 1, 6 L. ed. 23.
[13] Webster's Works, vol. 6, p. 8.
[14] Webster's Works, vol. 6, p. 9.
[15] Webster's Works, vol. 6, p. 18.

Two years later, in the course of his opinion in the Passenger Cases.[16] Mr. Justice Wayne thus spoke of the prior decision:

"The case of Gibbons v. Ogden, in the extent and variety of learning, and in the acuteness of distinction with which it was argued by counsel, is not surpassed by any other case in the reports of courts. In the consideration given to it by the court, there are proofs of judicial ability and of close and precise discrimination of most difficult points, equal to any other judgment on record. To my mind, every proposition in it has a definite and unmistakable meaning. Commentaries cannot cover them up or make them doubtful.

"The case will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy.

"There were giants in those days, and I hope I may be allowed to say, without more than judicial impressiveness of manner or of words, that I rejoice that the structure raised by them for the defense of the Constitution has not this day been weakened by their successors."

The last of Mr. Webster's great arguments in constitutional cases was in the Passenger Cases.[17] Several states, Massachusetts, New York, and others, had sought to levy a tax upon every immigrant coming into their ports. The amount was not great, neither was the tax on tea. But the importance of the principle was supreme. Our government was formed that commercial intercourse between this country and foreign countries should be open alike to all, and that no citizen or state could, directly or indirectly, acquire a monopoly of it, and in the decision of these cases the court followed Mr. Webster's argument, reversed the judgments below, and held the tax invalid. The decision was by a bare majority of judges, but it was the decision of the court.

In every one of these leading cases Webster successfully advocated the adoption of vital principles of constitutional law against the adverse decisions of the courts below. If the provisions of the Constitution had been applicable only to the original thirteen states, if that great charter were to be construed in a narrow sense, if any state had reserved the right to tax the agencies of the national government, if the states had power to control interstate commerce and to prevent citizens of other states from trading there without state permission, and if they had power to control international commerce, the Union would have been but a rope of sand. It would have gone to pieces at the first assault, and would indeed not have been worth preserving. What has given to this country its greatness is its well-ordered freedom, protected and secured by a strong central government, the indissoluble Union of the states. No individual or citizen of one state may have privileges secured to him by law, superior to the privileges of others. On the other hand, every citizen is secured by law in the acquisition of property and in the enjoyment of his personal rights. So long as American courts respect the principles thus established, and America combines public freedom with individual security, so long shall a grateful people cherish the memory of the expounder of the Constitution, the farmer boy of Salisbury, the eloquent far-seeing lawgiver and lawyer, Daniel Webster.

Everett P. Wheeler

[16] 7 How. 437, 12 L. ed. 766.
[17] Ibid.

Lord Stowell; Greatest Prize Court Judge

BY W. E. WILKINSON, LL. B.

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IT HAS probably fallen to the lot of no other single judge to exercise such a deep and far-reaching influence on the course of the law of his country as did William Scott (afterwards Lord Stowell) in the closing years of the eighteenth century and the opening years of the nineteenth century. During the period in which he presided over the prize court the great wars between Great Britain and France were being waged, and the supremacy of British seapower was being felt, if not acknowledged, by all nations, with the result that the British prize court was crowded with cases awaiting decision. At that time British prize law was in a lamentable state. There was little definite law to afford guidance; there was certainly no code of prize law, and but few judicial decisions were to be found recorded, and what there were recorded were only to be found in manuscript notes and memoranda. Lord Stowell thus found himself in the peculiar position, practically, of having to investigate for himself the law applicable in every case, and to evolve prize law on systematic lines, doing justice to both the belligerents and the neutral states.

But with the opportunity for the evolution of a new branch of British law, there was the man to seize and make the most of the opportunity afforded; and, what is far more important, there was a man whose natural abilities, early studies, and previous training had rendered him eminently suitable for the task before him. The result was remarkable. Lord Stowell's decisions form the basis of British prize law, which at bottom is the same to-day as it was when at the age of ninety years the great jurist died. His decisions have, if anything, gained in influence with the passing of the years; and though new principles have been evolved and some of the old ones modified or abrogated to suit the new conditions of modern warfare, yet Lord Stowell's decisions gained in credit during the Crimean war, and are quoted with approval and reverence in almost every case which comes before British prize courts for decision to-day. Beyond this, although there was considerable criticism of his judgments at the time by Americans who felt themselves aggrieved, American lawyers have since recognized the soundness of his decisions, and American prize law at the present day is also largely composed of the principles enunciated in the British prize court a hundred years ago by a single judge.

Birth and Early Life.

William Scott was born in the critical year 1745, the fourth child and eldest son of William Scott, of Newcastle-on-Tyne, who was at various times a coal shipper and small publican. His mother was the daughter of a local tradesman, and was his father's second wife. His younger brother afterwards became famous as Lord Eldon, the Chancellor of England.

A romantic story is told concerning the future judge's birth. At that time the Jacobite rebellion of 1745 was at its height, and the North of England was in a state of the greatest alarm, and the approach of the rebels to Newcastle seemed imminent. Accordingly the town authorities made every preparation for a siege, fitting the walls with cannon, closing the gates, and fortifying the whole town. A little while before Scott's birth the mother was placed in a large basket, and let down from the top of the town wall into a boat, and then taken down the river Tyne to Heworth, a village 4 miles away on the Durham side, and there, at the home of his mother's father, Scott

was born. The accident which caused his birth to be in the county of Durham, instead of in that of Northumberland had a profound influence on the subsequent career of Scott; for after receiving his early education at Newcastle grammar

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school, he obtained a scholarship enabling him to enter Corpus Christi College, Oxford, solely by reason of the fact that he was born in Durham. Scott matriculated as a student of Oxford University in 1761. Taking his B.A. degree in 1764, he was admitted a fellow of University College in 1765, and then became one of the college tutors. In 1767 he obtained the degree of M.A., became a B.C.L. in 1772, and in 1773 was elected Camden Reader in Ancient History. Although Scott's lectures were never published they were greatly appreciated, and are highly praised by the historian Gibbon. It is said that as a tutor Scott was unwearied in his care for the welfare of all who were intrusted to him. From his Oxford days dated Scott's intimate friendship with the great Dr. Johnson, the friendship there beginning only ending with the death of the great lexicographer, whose executor Scott then became.

At the Bar.

In 1776 Scott's father died, leaving him considerable property; and while winding up his father's estate Scott continued the shipping business in which his

father had been engaged, and thus the future lawyer gained a practical experience of maritime matters which was afterwards of great value to him at the bar and on the bench. He had long desired to go to the bar, and in 1777 he resigned his tutorship and took rooms in the Temple in London, retaining for the present his readership in history, which, however, he finally relinquished in 1785. Scott practised chiefly in the admiralty and ecclesiastical courts, and with this end in view he took the degree of D.C.L. in 1779, and was admitted a member of the faculty of advocates at Doctors' Commons in 1779. In February, 1780, he was called to the bar. At the bar he is said to have been a very poor speaker; so bad indeed that he had to write out his arguments, and then read them to the court. But his undoubted talents and wide reading in history and Roman law, coupled with his practical experience of shipping matters, soon began to attract suitors to him, and, before long, briefs began to pour in. In 1782 he was appointed Crown Advocate General for the office of Lord High Admiral, and in 1783 the Archbishop of Canterbury appointed him registrar of the court of faculties, which, although the office involved little if any work, brought Scott an income of £400 a year. In 1788 he was appointed judge of the consistory court of London, and in September of the same year he received the honor of knighthood. This was a year of honor for Scott, for before its close he was also appointed vicar-general for the Province of Canterbury.

In Parliament.

As early as 1780 Scott had tried to enter Parliament as the member for his University, but his efforts were unsuccessful. In 1784 he was elected for the borough of Downton, but was unseated on petition. After being again elected for Downton, in 1790, in 1801 Oxford University chose him as her member, and he represented this seat of learning in the House of Commons until his elevation to the House of Lords, in 1821. During the first six years of his parliamentary life, Scott is said to have spoken only once, on the 2d of June, 1795, and then only under the compulsion of necessity. Mr. Dundas had alluded to him as the legal authority who had advised ministers in their instructions to Sir C. Grey and Sir J. Jervis. A motion of censure was made on the proclamations of these officers in the West Indies, and Scott could not but advance to the rescue. During a parliamentary life of thirty-two years his voice was but rarely heard in the House of Commons, and according to his own confession it was always with great reluctance, and not unfrequently with some degree of physical pain, that he obtruded himself upon the notice of the House. It is true indeed that he brought in several bills of an ecclesiastical nature, and in 1803 succeeded in getting the clergy residence act passed. He was opposed to any concessions to the claims of the Roman Catholics.

On the Bench.

After holding the further offices of chancellor of the diocese of London, commissary for the city and diocese of Canterbury, and master of the faculties, to which latter office he was appointed in 1790, Scott was, on the 26th October, 1798, appointed judge of the High Court of Admiralty, and was sworn a member of the Privy Council. On the occasion of the coronation of King George IV., Scott was raised to the peerage, with title of Baron Stowell, and took his seat in the House of Lords on 5th February, 1822. In 1820 he resigned his office as judge of the Consistorial Court, his last decision being the well-known case of Ruding v. Smith, 2 Hagg. Consist. Rep. 371. It was not until February, 1828, that he resigned his judgeship in the Admiralty Court, although failing physical powers had for some time compelled him to have his judgments read for him.

Lord Stowell lived for some years after his retirement from the bench, and it was not until 28th January, 1836, that he passed away at the ripe age of ninety-one.

Lord Stowell had married first in 1781. The circumstances attending his second marriage in 1813 are again romantic. This marriage was the great mistake of his life, for his second wife

was as utterly unlike her distinguished husband as it is possible to imagine, and the whole matter was a complete failure. Scott, as he then still was, happened to be the presiding judge at the Old Bailey and one of the cases for trial before him was that of the Marquis of Sligo,—a young man of about twenty, who was being tried for enticing two seamen to desert from a man-of-war at Malta to join his yacht. The young man was sentenced, but during the trial the mother of the prisoner, Lady Sligo, widow of the Marquis of Sligo was introduced to the judge, and ultimately married him, when he was sixty-nine years old. The parties, however, afterwards separated.

It is, however, with Lord Stowell as the prize court judge that we are chiefly concerned, since his greatest title to fame rests on his labors in that tribunal. The French wars poured into his court for decision a most varied series of maritime cases. Since, as we have seen, there were few if any precedents to guide him, Lord Stowell enjoyed the greatest liberty of action, and he seized the opportunity to give unity and consistency to a department of English law, and for a generation he was rather a lawgiver than a judge.

Lord Stowell's judgments deal with such varied topics as the legal interruption to navigation which belligerents may create against neutrals, the rights of joint captors, the relation between international law and municipal law, the force and construction of treaties, the existence of an actual blockade, the condemnation of merchant ships for resisting search, questions of domicil, cases of unlawful detention, the extent of the protection of cartels, the validity of Orders in Council. On all these and many other matters Lord Stowell adjudicated with unerring accuracy. Perhaps the greatest tribute to his accuracy is to be found in the fact that though his decisions were often criticized and frequently appealed against, there in no single instance recorded of any single one being reversed.

Apart from questions of prize law, one of the most famous of Lord Stowell's decisions was that given in the case of the Slave Grace, on 26th September, 1827.

In addition to the cases by which he is best known,—prize cases,—Lord Stowell, it must be remembered, as the judge of the consistory court had to do with causes of a spiritual nature, as well as with testamentary and matrimonial matters. In the judgments which he delivered in matrimonial cases his benevolent wisdom and discerning justice are indeed seen at their best, and the judgment in the case of Dalrymple v. Dalrymple, 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11, is a delightful example of lucid argument, moral philosophy, and classical eloquence.

Lord Stowell had some of his judgments printed, and sent a copy of them to the admiralty judge of the United States. The latter in acknowledging it said: "In the excitement caused by the hostilities then raging between our countries, I frequently impugned your judgments, and considered them severe and partial, but on a calm review of your decisions after a lapse of years I am bound to confess my entire conviction both in their accuracy and equity. I have taken care that they shall form the basis of the maritime law of the United States, and I have no hesitation in saying that they ought to do so in that of every civilized country in the world." Mr. Justice Story in his Commentaries reiterated this eulogy in the strongest terms.

Lord Stowell had a remarkable power of lucid exposition. Lord Brougham said of him: "There has seldom if ever appeared in the profession of the law anyone so peculiarly endowed with all the learning and capacity which can accomplish, as well as all the graces which can embellish, the judicial character.

All his life it is said Lord Stowell was slovenly of dress and saving in his ways, but very courteous and polished in his manners; and despite a weak constitution and a fondness for eating and drinking, his bodily health remained good until he was quite old.

W Erilkinson

Abraham Lincoln

—His Standing as a Lawyer—

BY JOHN T. RICHARDS

Former President of the Chicago Bar Association; Author of recent work entitled "Abraham Lincoln, the Lawyer—Statesman"

THE career of Abraham Lincoln has received the attention of many historians, and his marvelous achievements have excited the wonder of mankind. Men of deep learning and profound scholarship have paid tribute to his great wisdom in the affairs of state. During the most trying period in our history, statesmen of vast experience gladly followed his leadership and paid willing homage to his superior judgment in matters which concerned the welfare of the government and its people.

He was born and reared amidst an environment such as to discourage the growth of intellectual force and blot out every aspiration to mental achievement. Without a systematic training in the rudiments of the knowledge of the schools, through earnest and unremitting toil, he became a leader of men. Many who at colleges and universities had drunk deeply from the fountain of learning listened to his counsels with that respectful attention which is due to those wiser than ourselves. His great wisdom in matters which involved the welfare of the nation has received abundant acknowledgment, but there has been much misapprehension in relation to his standing as a lawyer.

He was admitted to the bar of Illinois, March 1st, 1837. At that time neither the laws of that state nor the rules of court required the applicant for admission to the bar to pursue any course of study or submit to an examination as to his qualifications, but notwithstanding this fact Mr. Lincoln began a systematic study of the standard text books in the year 1834. He had just been elected a member of the legislature of Illinois from Sangamon county. John T. Stuart, then a member of the Springfield bar, who was elected to the legislature at the same time, had, during the canvass, advised Lincoln to study law, and loaned him the necessary law books. Lincoln took the books to his home at New Salem, and there, when not employed in his work as a surveyor, devoted himself to their study until the time came for him to enter upon his legislative duties. They were then laid aside until the adjournment of the legislature, when their study was resumed, and this method was pursued until he considered himself fitted to enter upon the practice of his chosen profession.

A story has been current for many years to the effect that Mr. Lincoln received his inspiration to study law from having become possessed of a dilapidated set of Blackstone's Commentaries, which had been cast aside by some one as waste paper somewhere in the neighborhood of New Salem, where he resided at that time, but the story appears to be without foundation, for he himself said that Stuart advised him to study law during his first campaign for the legislature, and at the same time offered to lend him the necessary books; that the offer was accepted and the books taken to his home for study. Had be been supplied with Blackstone's Commentaries in any other way, he would have said something about it. His great thirst for knowledge had induced him to begin the study of English grammar when he was twenty-three years of age, which affords evidence of his determination to use every means within his power to acquire such an education as would fit him for a career of influence. That he was endowed with a great intellect is beyond question. He

was always ambitious to win the approval of his fellowmen, but his ambition to get on in the world never prompted him to seek his personal advancement at the expense of a principle. He stood for those measures, only, which were approved by principles of right. This element of his character is shown by his expression of admiration for the fame of Douglas, while at the same time he did not hesitate to condemn the means by which it was acquired. Said he:

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ABRAHAM LINCOLN.

his conscience and judgment, and refused to climb to place or power through a disregard of human rights. He declined to support any measures which he did not believe to be just. The applause of men was pleasing to his ear, but he scorned to win it in any other way than by adherence to sound and enduring

"Twenty-two years ago Judge Douglas and I first became acquainted. We were both young then,—he a trifle younger than I. Even then we were both ambitious, I perhaps quite as much so as he. With me the race of ambition has been a failure,—a flat failure,—with him it has been one of splendid success. His name fills the nation, and is not unknown even in foreign lands. I affect no contempt for the high eminence he has reached. So

reached that the oppressed of my species might have shared with me in the elevation. I would rather stand on that eminence than wear the richest crown that ever pressed a monarch's brow."

This pronouncement was a true index to his character. He held fast to the right as he saw it, whether in private or public life, regardless of consequences personal to himself. He despised injustice and chicanery. He was so constituted that he could not employ his great talents in the support of an unjust cause. His professional ideals were above adverse criticism. He became one of the great lawyers of his generation, and was known and recognized as such throughout the state of Illinois. His practice in the state and Federal courts involved many important cases, and in the volume of business which passed through his hands he stood second to none. His successes were remarkable, for out of his 175 cases reported in the Illinois Reports he won the majority. That he was equally successful in the Federal courts is probable, but, owing to the loss or destruction of the records of these courts by the Chicago fire of 1871, it is impossible to ascertain the facts. He tried cases of every class, both at law and in chancery, and also many criminal cases; but it is a singular fact that no criminal case with which his name is connected is to be found in the Illinois Reports. This would seem to confirm the statement often made, that he refused to undertake the defense of a person whom he believed to be guilty of the crime charged against him, and that his clients, in such cases, were usually acquitted by the jury. He had few equals as an advocate. His powers of analysis and discrimination were of a very high order. By reason of this he never failed to make clear the most complicated situation, and the court never failed to grasp his meaning, whether the case was one involving questions of law or of fact. The law, as he understood it, was "the perfection of reason."

A former judge, who presided in the supreme court of Illinois during the years of his greatest activities at the bar, has said of Mr. Lincoln: "He learned the law as a science. Nature endowed him with a philosophical mind, and he learned and appreciated the elementary principles of the law and the reasons why they became established as such." The truth of this statement is amply proved by the reports of cases with which he was identified. He cited few authorities, but relied chiefly upon principles. It must not be supposed that his opponents were low-grade lawyers, or uneducated men, for the contrary is true. Many of them were graduates of such institutions of learning as the University of Virginia, Yale, Brown, and other schools of equal standing, and while none surpassed him in ability they were worthy adversaries in any cause.

Mr. Lincoln was also a great constitutional lawyer. He has had few equals in his knowledge of the formation, the history, and the limitations of the Federal Constitution. His speeches and state papers afford abundant proof of this. While President, he was as careful to guard the rights of the states under the Constitution as he was to enforce obedience to the national authority. His reverence for the Constitution and laws of his country was due to his thorough understanding of the reasons which brought about their enactment. His career at the bar was the school in which he became fitted to serve his country as its chief magistrate. The Constitution was the chart by which he guided the Ship of State through the years of the Civil War. Had he lived to finish his second term as President, it cannot be doubted that the record of his achievements would have added greatly to his renown as a constitutional lawyer, as well as to his fame as a wise and accomplished statesman.

John S. Richards

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The Legal Career of Patrick Henry

BY ROBERT S. SHAW

of the Philadelphia Bar

HISTORY has assigned to Patrick Henry the high distinction of being America's foremost orator. This "Forest-born Demosthenes," as he has been called, was also a lawyer of great ability, occupying for many years a place in the front rank of the American bar. The professional side of his career has, however, been largely overshadowed by the record of his matchless service in the cause of American Independence.

Henry was of Scotch descent, and was born in Virginia in 1736. His father, a man of high scholastic attainments, but lacking in business ability, was a nephew of Dr. William Robertson, Scotland's great historian. As a boy, Patrick attended the village school until the age of ten years, when he was taken home, where, under the direction of his father, in his own house, he continued his studies, acquiring a rather superficial knowledge of Latin and Greek. He became somewhat of a mathematician, but, owing to the indolence of his nature, his knowledge of this subject was of no solid advantage to him. He was a lover of the sports of the field, and often, when the hour for study arrived, he was to be found by the riverside with his fishing rod, or rambling through the forest with his gun. For whole days and weeks together, it is said, he would wander through forest and field listlessly, sometimes in search of game, or he could be found ofttimes lying in a shady nook on the bank of a stream, lost in deep meditation as he listened to the rippling of the waters. He loved music, was passionately fond of the flute and violin, and as a youth was an ardent lover of good books. At the age of fifteen he became an assistant salesman in a store, and after a year's experience his father, having bought him a small stock of goods, set him up in business with his brother William. In one year's time the firm became bankrupt. Henry, being eighteen years of age, married Miss Shelton, the daughter of a neighboring farmer, and through the joint efforts of their parents the young pair were settled on a farm, where, with the assistance of two or three slaves, they endeavored to earn a livelihood. Of Henry's life at this period, William Wirt, his principal biographer, has said: "It is curious to contemplate this giant genius, destined in a few years to guide the councils of a mighty nation, but unconscious of the intellectual treasures which he possessed, encumbered at the early age of eighteen with the cares of a family; obscure, unknown, and almost unpitied; digging, with wearied limbs and with an aching heart, a small part of barren earth, for bread, and blessing the

THE AUTHOR.

hour of night which relieved him from toil. Little could the wealthy and great of the land, as they rolled along the highway in splendor and beheld the young rustic at work in the coarse garb of a laborer, covered with dust and melting at the end of a year's trial again came to grief, and left him penniless and with an increasing family to support.

While occupied at "keeping store," Henry found many leisure moments, which he improved to great advantage.

Photo by Boston Photo News Co.

PATRICK HENRY.

in the sun, have suspected that this was the man who was destined not only to humble their pride, but to make the prince himself tremble on his distant throne, and to shake the brightest jewels from the British Crown." After a trial of farming for two years, Henry abandoned it and again took up mercantile pursuits. His venture at store keeping, He studied geography, familiarized himself with the charters and history of the colony, and became a master of history, particularly that of Greece and Rome. More important still, he became a profound student of human nature. This was the beginning of his career as a lawyer, although at the time he was entirely unconscious of it. It is said that when-

ever a company of customers met in his store, as frequently happened at the end of the week, and were gay and talkative, he would take no part in their discussion, but listen in silence. When the conversation flagged he excited them to remark, collision, and debate, affording him opportunity to study and compare their characters. With this in mind he would state a hypothetical case, and call for their opinions, one by one. If they differed he demanded their reasons, and highly enjoyed the debates in which they became involved. He would relate to them stories calculated to excite, by turns, pity, terror, resentment, indignation, and contempt, and would pause occasionally during his narration to observe the effect which was produced upon his listeners. By this practice he became a master of a simple, clear, and persuasive style of speech.

Inspired by his reading of the harangues in a translation of Livy, he now turned his attention to the law, that "jealous-eyed science" which, according to Lord Coke, "allows of no other mistress." For admission to the bar, he is said to have studied but six weeks, and on this scanty preparation obtained a license. When he was admitted to practice, he found at the bar men of great professional attainments. Edmund Pendleton, George Wythe, John Randolph, and Thomas Jefferson were the leaders of the profession.

Henry has himself related his experience when examined by Mr. John Randolph, who afterwards became the Attorney General for the colony. By his ungainly appearance and address Henry so shocked Randolph that at first he refused to examine him; but learning that he had secured the approval of two others of the committee, he reluctantly proceeded with the examination. For several hours Randolph interrogated the candidate, not only on the common law, but on the law of nature and of nations, on the policy of the feudal system, and on general history, and he soon discovered that beneath Henry's rough exterior was the material out of which fine legal talent would rapidly develop. He was actually amazed at the admirable way in which Henry defended his opinions, and on one point Randolph and the candidate disagreed. After considerable discussion, he said: "You defend your opinions well, sir; but now to the law and to the testimony." Thereupon he led Henry to his office, and opening the authorities said to him: "Behold the face of natural reason. You have never seen these books nor this principle of law, yet you are right and I am wrong, and from the lesson which you have given me (you must excuse me for saying it), I will never trust to appearances again. Mr. Henry, if your industry be only half equal to your genius, I augur that you will do well, and become an ornament to the profession." From that day, Mr. Randolph always had for Henry the most marked and permanent respect.

Henry was now twenty-four. He knew almost nothing of the law; was wholly ignorant of the practical application of it. He could not even draw a declaration or plea; knew not how to bring a suit or make a simple motion in court. It is therefore not surprising that it was several years before Henry gained recognition among his brethren of the bar. Meantime his family was in extreme want, and he was obliged for a part of the time to assist his father-in-law in his business of tavern keeping.

Charles Stewart Parnell has well said: "Opportunity is a horse saddled and bridled, which stops at each man's door once in a lifetime. Be ready, mount, and he carries you on to success and honor. Pause but a moment, he is gone, and the clatter of his iron hoofs echoing down the corridors of time will forever remind you of what you have lost." Henry's opportunity came, and he was ready for it. He sprang into the saddle, and at once dashed into celebrity. This was the "Parsons Cause," in which the clergy of the English Church brought suit to recover their annual stipend, as fixed by law, of 16,000 pounds of tobacco. On account of the failure of the crop, the legislature passed an Act allowing the planters to pay the tax in money at the rate of 16s. 8d. per hundredweight, although the actual value was 50s. or 60s. The court decided that the act was invalid, and the only question left was the

quantum of damages to be assessed by a jury. The case selected for a test was that of the Rev. James Maury against the Sheriff of Hanover County and his sureties. Mr. John Lewis, an eminent lawyer, the planters' counsel, threw up the cause as hopeless, and his clients in despair engaged Henry, who undertook at a subsequent term to argue it before a jury. On the day of the trial there was gathered at the courthouse a great concourse of people. This was Henry's first appearance at the bar, and all eyes were turned upon him. The court room was completely packed, and to afford room for as many as possible in the room, twenty clergymen were permitted to sit upon the bench. In the chair, presiding as judge, was Henry's father, who at first was agitated and confused, fearful lest his son should fail. After a brief argument by his opponent, Henry very awkwardly arose, and in faltering manner began his address to the jury. Soon he recovered his self-possession and began to glow with an eloquence the like of which his hearers had never heard. His attitude became lofty and erect, his countenance beamed, and his eye sparkled with intelligence, his coarse exterior vanished, and he "underwent that mysterious transformation which the fire of his own eloquence never failed to work in him." The clergy who came to mock now became alarmed; they listened spellbound, and when, in answer to the eulogy of his opponent, the young lawyer turned to them and poured upon them a torrent of overwhelming invective, they fled from the bench in precipitation and terror. So completely had he captured the jury that they lost sight of the law and the evidence, and in the enchanted hour rendered a verdict for the planters. One who heard him said: "He made their blood run cold and their hair rise on end." So surprised and amazed was his father that he forgot where he was and the character he was filling, and tears of ecstacy coursed down his cheeks. No sooner had the verdict been received than the people seized Henry at the bar, and in spite of his own exertions, and the continued cry of order from the officers of the court, they bore him out of the courthouse, and on their shoulders carried him triumphantly about the yard. This was a splendid triumph for Henry, and lifted him out of that obscurity which had hitherto been his. At once he became the people's idol; business came rapidly to him, and within a year he was elected to the House of Burgesses. This body was then composed of some of America's ablest and most illustrious statesmen. George Washington, Peyton Randolph, Richard Bland, Edmund Pendleton, George Wythe, and Richard Henry Lee were members.

In the House of Burgesses Henry became at once the leader of the opposition to British rule. He was sent as a delegate to the First Continental Congress, which met at Philadelphia, and by his fervid and patriotic appeals he stirred that body into action against the tyrannical policy of England. Henry was admitted by the delegates to be the greatest orator then in America. His illustrious record as a patriot and legislator need not be dwelt upon here. Suffice it to say, that he kindled such a flame of opposition to British tyranny that it spread as if on wings of the wind throughout the entire Continent.

Henry was Virginia's first governor after the adoption of a state government, in 1776. He was again elected to that office in 1778, and thrice thereafter declined a re-election.

His practice during the revolutionary years fell off completely, as his public duties absorbed his whole time and attention. Financial disaster as a result came upon him. One of his friends was led on this account to say: "Go back to the bar,—your tongue will soon pay your debts." Judge Spencer Roane, a cotemporary of Henry, said of him: "It was as a criminal lawyer that his eloquence had the fairest scope." William Wirt Henry adds: "His wonderful powers as an advocate made him especially great in nisi prius practice, but he was also retained in important chancery cases, and some of his greatest triumphs were in arguments addressed to judges on questions of law. Having discontinued his profession for over thirteen years, it was wonderful how rapidly he was able to recall it, and enter at once upon one of

the most brilliant careers as an advocate ever known to the profession."

His practice was extensive, the result of his fame, popularity, and his extraordinary persuasiveness. He usually could dictate large fees, and there is a tradition now widespread in Virginia that he was too eager for money. It is said that he grew rich before he withdrew from the bar, and was proud of his success as a money maker.

There are many anecdotes about the shrewdness of Henry in securing acquittals for his clients. In the region of Lynchburg this story is told of "the Governor," as he was spoken of: "A man stole a hog, dressed it, and went to the governor to defend him. The governor said: 'Did you walk away with that shoat?' 'I don't like to say.' 'Out with it!' 'Yes, sir.' 'Have you got the carcass?' 'Yes, sir.' 'You go home, you wretch; cut the pig lengthwise in half, and hang as much of it in my smokehouse as you keep in yours.' At the court the governor said: 'Your honor, this man has no more of that stolen shoat than I have; if necessary I'd kiss the Bible on this.' The man was cleared."

His power as an examiner was displayed in a marked degree in the celebrated murder trial of Richard Randolph, in which case he was associated with Alexander Campbell, an eminent advocate, and John Marshall (Chief Justice Marshall). It was largely through Henry's efforts that an acquittal was secured. John Randolph of Roanoke, a brother of the prisoner, once spoke of Henry as "the greatest orator that ever lived," and extravagantly added that "Henry was Shakespeare and Garrick combined." Said he: "It would be as vain for me to try with this piece of charcoal to paint the brilliant flash of the vivid lightning, or to attempt with my feeble voice to echo the thunder, as to convey by any power I possess a proper idea of the eloquence of Patrick Henry."

In personal appearance Henry was "nearly six feet high, spare, rawboned, with a slight stoop to his shoulders. Says Judge Roane: "He had a fine blue eye, and an excellent set of teeth, which, with the aid of a mouth sufficiently wide, enabled him to articulate very distinctly. His voice was strong, harmonious, and clear, and he could modulate it at pleasure."

His practice extended all over his state, and was of a most varied character. His two most notable cases were the "Parsons Cause" of his early days, and the celebrated "British Debt Cause." In this latter case, he made the greatest legal effort of his life. It is said that in preparation for it he shut himself up in his office for three days, during which time he did not see his family, and his food was handed to him by a servant through the office door. In November, 1791, the case came on for argument before the Federal court in Richmond. The question involved was the right of Virginia to confiscate, during the war, debts due by her citizens to subjects of Great Britain. With Henry was John Marshall.

Henry was engaged three days successively in the delivery of his argument, and the audience remained throughout, their interest seeming to increase as it progressed. When Henry finally sat down, the concourse rose with a general murmur of admiration, the scene "resembling the breaking up and dispersion of a great theatrical assembly." Henry took the position that, by the law of nations, contracts between the people of belligerent countries are void; that under the strain of war, the debts were justly confiscated; that Great Britain had broken her treaty in more ways than one, and, finally, that the independence of America had brought about an annulment of a thousand things of greater importance than obligations for the payment of a few pounds sterling.

At the close of a thrilling passage in which Henry appeared at his utmost height and grandeur, Justice Iredell cried out: "Gracious God! He is an orator indeed!" Thus did Henry in his last great case close his career as an advocate with blazing triumph.

Robert S. Shaw

Alexander Hamilton

—The Lawyer as a Constructive Statesman—

*BY HON. SAMUEL W. McCALL**

of the Boston Bar; Governor of Massachusetts

IT IS proof that Alexander Hamilton has taken his place among what we call the immortals, when, more than a century and a half after he came into the world and more than a century after he left it, his birthday is celebrated in so many places throughout the nation he did so much to establish. In a strict sense, it is the beginning and not the ending of a career which we commemorate. The beginning is enveloped in hope and fear; it has all the chance of failure or success, while the end has the certainty of achievement; the dangers have been passed, and the completed record is spread in the clear light. Lord Rosebery said upon the hundredth anniversary of the death of Burns, that it was perhaps more fitting to celebrate the end and not the beginning, for "the coming of these figures is silent. It is their passing that we note." And yet we find ourselves as if we stood on the day of the birth at Nevis, filled with the spirit of prophecy and looking forward, tracing the full flight of the spirit until it came to its rest. We feel the fresh hopes of the coming and the gathering shades of the going, the dawn and the sunset, and all the glory that lies between them, and we see, too, the workings of the great test of time, the estimates of the later generations of men. So when we celebrate the beginning we celebrate it for what came after; we celebrate the life and the deeds of the statesman, not merely as they were unrolled, but as they appear in the light of their results.

When men deal greatly with the eternal human problems, so far as such problems may be eternal, they are apt to involve their fame in almost eternal controversy. They put it on the ebb and flow of the ever-shifting tides of opinion. Systems of government are fundamental in their importance. They involve questions upon which men always have differed and probably always will differ. Those differences are greater where a system is not the slow growth of centuries and adapted by time to conditions, but is a creation contrived at one time and set in motion by a single group of men. It was Hamilton's fortune to be identified with basic theories and basic policies of government, perhaps more closely than any other statesman in our history. At a time when we had no real Federal authority, and the affections of a large majority of our people were centered upon the states, he was the very genius of nationality. He, more than any other man, was the aggressive champion of a central government strong enough to establish with certainty a real unity among the states, and to put an end to the discordant policies, the weakness, and even anarchy which then existed. He breasted the pride of patriotism held toward thirteen small nations. He shocked the prejudices of men, and achieved a political hostility which has not even now wholly disappeared. And then in that most critical time when the Constitution was to be put in operation as a practical mechanism, when the invention, which was only upon paper, was to be converted into a living instrument, and the new and untried system was called upon to meet the most delicate questions in foreign policy and almost insuperable difficulties in our domestic affairs, Hamilton was pre-eminent in the part he took in setting the wheels of the government in motion and starting the new nation in

* Address before the Alexander Hamilton Memorial Association.

the right direction. It required two generations to win forgiveness for the commanding part he played to secure a nationality which should have no ambiguity about it. Until the Civil War had defined the nation to be what Hamilton desired to make it in the first instance, and what he strove to make it in Washington's administration, the estimates of the character of his work were almost equally divided between violent abuse on the one side, and as violent panegyric on the other. Thus more than that of any other of our statesmen his fame has been in danger of partisanship both from friend and foe.

By permission of Horace K. Turner Co., Boston.
ALEXANDER HAMILTON.

In what may we best see the characteristic quality of his statesmanship? To my mind it is in his swift and unerring comprehension of complex and difficult situations, and the surprising rapidity of his genius in providing a fit remedy. He was not what might be called a political philosopher; at least he wasted little time in evolving abstract theories of government. But he brought his mind to bear upon exact conditions, and in dealing with them he showed himself to be the greatest practical statesman America has ever produced. The barest outline of his work will show its remarkable character.

When called to the Cabinet of Washington, it was not to administer an existing institution, but to create one. It was necessary that the government should have income, that it should have fixed the ways of collecting and paying out money; myriads of details were to be provided, and great fiscal policies to be adopted. In the five years when Hamilton was at the Treasury he established that institution for all time. The most convincing arguments used in the campaign of 1896 against the silver monometalism that was put forth under the name of bimetalism were drawn from Hamilton's report upon the mint, in which he established the double standard. His funding of the debt against a powerful opposition created that marvelous thing, the credit of the United States, and the assumption of the state debts gave a most needed strength to nationality by leading public creditors to look to the national government instead of to the states. His report upon the bank remains to-day as a model for a sound banking system. In his report on manufactures he marked out such an industrial nation as his country finally came to be.

Hamilton was, in fact, Washington's prime minister, and took the leading part in the important work of the other departments. When the war came between Great Britain and France there was a popular clamor, almost irresistible, in favor of our taking part in the struggle. Under Mr. Jefferson's policy we should have been swept into the vortex as an ally of France. Hamilton was, under Washington, the aggressive force which brought about the resolution of neutrality, and saved us from a war that would have threatened our independence. He had leveled at him the taunt—terrible in those times—that he was a friend of England. But when English ships began to harry our commerce he instantly made a report to Washington, recommending the fortification of our harbors, the raising of troops, and preparation for war. No country ever had a truer or a more vigilant friend, and when her interests were threatened he was ready on the instant to champion them against France or England or the world.

It was a fortunate thing that there were then two schools to combat each other,—the school of Hamilton and the school of Jefferson,—but it was even more fortunate that the school of Hamilton had absolute dominion during the first eight years. Nothing less aggressive and strong could have coped with the appalling difficulties of that time. It was necessary that a hard impact should be made upon the governmental chaos, in order to set the new orb grandly moving. Had the opposite school dominated at the beginning, its motion must have been feeble and erratic, and it is doubtful whether the government would have continued for a generation.

I have spoken of the attitude of Mr. Jefferson toward neutrality. Mr. Jefferson was a great philosopher, an unrivaled politician, but he was dreamy and contemplative, where Hamilton was practical and direct; and it was not strange that he rarely agreed with the policies of the latter. The difference in the mental operations of the two men was constantly showing itself, and it is well illustrated by their divergent views upon France. Mr. Jefferson for the five years preceding 1790 was in France as our minister. Hamilton was never there in his life, nor, indeed, anywhere outside of America and the West Indies. Two years before the French Revolution Jefferson made a tour of France, carefully investigating social and political conditions, and he wrote very amiably and philosophically about them. But, as Mr. Oliver says, he passed over the crust of the lava without reporting any sign of danger, and even after the fall of the Bastille he did not appreciate the gravity of the crisis. Yet Hamilton, before the news of that event had reached America, wrote a letter to Lafayette, forcibly pointing out the elements of danger in the French situation. As Talleyrand said, Hamilton "divined Europe." His sure penetration and his celerity of action remind one of nothing so much as of Napoleon in his early campaigns, when he astonished men by the energy of his genius.

Hamilton had in him very little of the mere political theorist, of the kind of man who will unravel theories of gov-

ernment while you wait, who will open up beautiful vistas, but when you ask for a remedy will be nebulous and vague. He had an instinct for the real difficulty; his eye would instantly penetrate to the vital point, and he would pounce down upon it as unerringly as an eagle upon its prey. For him to think was to act.

Nearly all men were impressed by the grave perils that enveloped the country after the treaty of peace. Most statesmen were overwhelmed by them, but Hamilton made himself a mighty force in our deliverance by at once proceeding to work for a central government. He is criticized for having proposed a constitution with strong centralizing features; but was it not just such a government as a great practical statesman would have proposed to meet the evils of that time? By his vehement stand it is probable that the Constitution was given the strength that it finally had. One has only to glance superficially at the condition of anarchy that pervaded the country for a half dozen years before the Constitution was established to appreciate the course of Hamilton.

There was nominally a central government, but it had no real power. It had made a treaty of peace recognizing our independence, and it was unable to carry out its obligations. In spite of its agreement, states were passing laws in the very teeth of the treaty, and Loyalists whom the confederation had agreed to protect were hanged and shot and beaten and robbed. Laws were passed by the different states, making it difficult for British merchants to collect debts. The soldiers who had fought on the fields of the Revolution were unpaid and dissatisfied; states were levying tariffs against each other, were disputing with each other over claims, furbishing up their flintlocks, and some of them were upon the brink of war. They were hopelessly in debt, and had nothing resembling public credit. Poverty was general, and trade and commerce were near the point of extinction.

The one unfailing resource usually called into play when public credit is gone was still left; they could issue paper money, and the printing presses were set in motion. There was indeed an era of magnificent prices. The farmer received $4 a pound for his meat, but when he desired to buy a suit of clothes he was compelled to carry his money with him in bales. This state of things could not have continued much longer without civil war and the destruction of our independence, either by force from the outside or as a result of our own appeal to some foreign nation to deliver us from anarchy. The one thing that could deal with this condition of chaos was a central government which should have certain jurisdiction over the common concerns, and be strong enough to stand before the world as a nation. Hamilton, with his practical statesmanship, dealt his blow at the vital point. He proposed to meet fully the conditions that then existed; he proposed to put it beyond question that the laws of the national government should operate upon individuals, and that states should not have the power to nullify national laws or national treaties. Under his plan neither Mr. Jefferson nor Mr. Madison could have drawn up Virginia or Kentucky resolutions in which the doctrine of nullification was scarcely veiled, and which lent strength to the forces of disunion. If it had not been for his powerful appeals after the convention in his speeches and in the Federalist, it is probable that the Constitution would never have been ratified, just as it is probable that it would never have been adopted but for his efforts before the convention was held.

We are told to-day that he proposed too strong a central government. In the light of the development which a century has given us, it is probable that he did, but he was very frankly for the nation. He had seen enough of thirteen independent sovereigns operating under a single confederacy. It can at least be said that no war would have been necessary in order to adjudicate his meaning.

The Constitution has shown its sufficiency to maintain a nation, because it has been developing in the direction of Hamilton's idea. It is certain that, as construed by Madison and others of the great men of that time, it did not clearly fix the relations of the national government to the states. The Virginia and the

Kentucky resolutions and the Hartford convention reflect the opinion, very commonly held before 1831, that the states under certain conditions might assume to nullify national laws. It was left to the eloquence of Webster to make popular the idea of union and the complete supremacy of the national government within its sphere, to animate millions of men to rally behind Lincoln in support of that certain nationality for which Hamilton had contended.

There has been an important extension of national powers by reason of enlarged construction, changed conditions, and the great increase in the importance of the subjects to which those powers were directed. Some of us think that development has gone too far. Through the power of taxation, the regulation of commerce, and the other expressed and implied grants, and through the final supremacy which war has decreed, the central authority has greatly reduced the practical importance of the states. Thus the genius of Hamilton astonishingly persists even in that portion of his plan which was most generally disapproved. There has been with the lapse of time some shifting of sides. The most extreme encroachments upon state powers are sometimes proposed or sanctioned by his theoretical enemies. Jeffersonian in theory, they would carry the centralization of Hamilton to practical lengths of which he probably never dreamed.

Hamilton was very little of a politician, and certainly not a great party leader. He was too direct and earnest; he was no master of intrigue; and if he could not manage men by an appeal to reason he could not manage them at all. He could not cajole and flatter, nor pretend to listen and sympathize when he did not believe. He entirely lacked the pose. He could not fade into the dim distance when the time came for bearing an unpopular responsibility. He was ready bravely to avow what he did. After his party, under his leadership, had accomplished its great work it was scarcely able to maintain its organization, but the results of his ideals survived in the existence and growth of the nation.

He was a fervent believer in free government. He would have men breathe the mountain air of free institutions, and develop by liberal laws a powerful and diversified state such as alone should occupy our superb domain. He would have all power proceed from the people, but so proceed that it should not reflect mere impulse and immature opinion, leading to bad government, and thus make necessary the reaction to a less liberal form. The checks and limitations upon such hasty action as he had so often seen the states adopt he believed were necessary to the stability and success of a free government.

His policies led to an amazing and many-sided development. Instead of having a nation composed only of cultivators, he aimed to develop a nation of cultivators and artisans, of merchants and traders; he contemplated a borrowing and a lending, an agricultural, a manufacturing, and a commercial state, in which all classes should contribute to the good of the whole. He would not have a system under which the few could oppress the many nor the many oppress the few, and to that end he advocated representative government.

"The ancient democracies," he said, "never possessed one feature of good government; their very character was tyranny." Under their system of direct government "it became a matter of contingency whether the people subjected themselves to be led blindly by one tyrant or by another." In the interest of real freedom and of popular rights he believed profoundly in the representative system.

He easily takes his place among the greatest statesmen of history, but I imagine he would have made an even more superb and classical figure if he could at the same time have been a member of one or the other of our two Houses and of Washington's Cabinet, and have identified with his policies his commanding talent for parliamentary leadership. . . . Such a system would have increased the appeal which Hamilton makes to the imagination. He undoubtedly was a very great debater. His achievement in the New York convention would alone establish that. It is true that events outside power-

fully aided him. State after state had ratified, and while the convention was still sitting New Hampshire furnished the decisive vote, and Virginia, for good measure, was added. It was hardly credible that New York, then only the fifth state in population, should remain out of the Union, with Rhode Island for her only company in the North. But even then the conversion of an assembly which began more than two to one against him was an extraordinary achievement. . . .

In one respect no statesman was ever more fortunate than Hamilton. Probably he would have produced his financial and economic policies without the aid of Washington, but he never would have been able to put them into effect. . . . The policies of Hamilton were carried by the magic of Washington's name, and those policies were so out of touch with the ideas and passions of the times that even the influence of Washington was none too great. Washington knew Hamilton as only he could know one who, during long years of war, had held the most confidential place upon his staff. He knew Hamilton's strength and weakness. He knew how to direct and restrain him. His marvelous good sense could provide the needed touch to make the difference between success and failure. There were no two great men of history whose careers were more intimately blended. What a fortunate thing their union was for America. When we regard the one we are sure to think of the other. We look upon the grandeur of Washington's fame with the awe and reverence which a near approach to perfection inspires. We do not find in Hamilton that balanced greatness. But he had creative qualities in which he stands peerless among our statesmen. He survives to-day in the very structure and fiber of the nation and of its government. And his countrymen even yet feel the light and heat of his splendid genius.

L'envoi

When life's shadows fall far to the eastward,
And the dimness of night is at hand,
Sir Counsel, you'll find the path ending
Where cold creeps the Styx on the strand.

All must cross—some have gone on before you,
Saints of peace and stern minions of war,
And we hear that beyond each has pleaded
Alone to the Judge of that Bar.

Now, just as the black barge of Charon
Grates grim on the shallows before,
Are you ready for trial, Sir Counsel,
Of the life lived on earth's silvern shore?

You remember the oath once was taken:
You would help, never hinder, the laws,
And never for gold nor for favor
Would suffer the poor lose his cause.

Are you ready to plead to the issues
Where demurrers are never sustained
(Though 'twas other just over the river
Where on unjust and just good was rained)?

Are you *ready for trial,* Sir Counsel?
Is it "Yes" or a tremulous "No?"
Will you creep like a felon to judgment,
Or go on as a counsel should go?

Brad W. Mathson,

John Marshall Harlan

BY OBED CALVIN BILLMAN, M. P. L.

of the Cleveland Bar

OF THE late John Marshall Harlan, known as "the dissenting justice" of the United States Supreme Court, it may be truthfully said that his convictions of right and wrong were written on marble, and the waters and floods of opposition, strife, and entreaty, did not dim a letter of the inscription.

A brief review of his life, his career as a soldier, a lawyer, a statesman, and as a justice, with a few brief excerpts from his writings and dissenting opinions,—many of the latter now being regarded as setting forth the true "law of the land,"—will serve to exemplify the above.

John Marshall Harlan was born June 1st, 1833, in Boyle county, Kentucky. He was the son of Honorable James Harlan, who was one of the representatives from Kentucky in the twenty-fourth and twenty-fifth Congresses, attorney general of Kentucky 1848 to 1856, and United States district attorney in 1862.

The subject of this sketch was graduated at Centre College, Kentucky, in 1850, studied law at Transylvania University, and practised his profession at Frankfort. In 1858 he occupied the position of county judge. In the succeeding year he received the unsolicited nomination, from those opposed to the Democratic party, to a seat in Congress in the Ashland district, and out of a total "of over sixteen thousand" in the District, fell but sixty-seven short of an election. In the next year he was a Bell and Everett elector upon the state ticket, and, following that election, removed to Louisville, and there associated himself with the Honorable W. F. Bullock as a partner in the practice of law.

As an expression of his fearless devotion and loyalty to the Union upon the outbreak of the war, he raised the Tenth Kentucky Volunteer Infantry in the fall of 1861, and served in General George H. Thomas's division. Owing to the death of his father in the spring of 1863, although his name was then before the Senate for confirmation as a brigadier-general of volunteers, he felt compelled to resign his position, and accordingly addressed a letter to General Rosecrans in which he said:

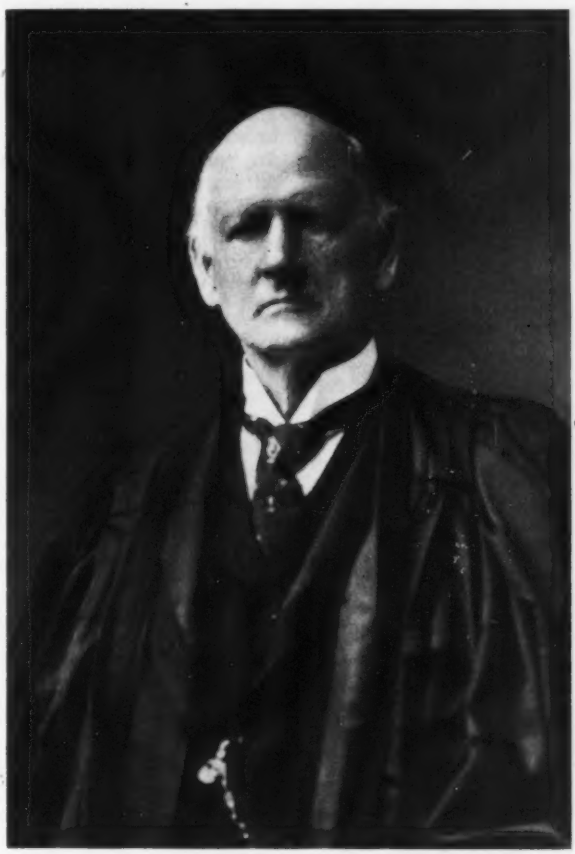
"I deeply regret that I am compelled, at this time, to return to civil life. It was my fixed purpose to remain in the Federal army until it had effectually suppressed the existing armed rebellion, and restored the authority of the national government over every part of the nation. No ordinary consideration would have induced me to depart from this purpose. Even the private interest to which I have alluded would be regarded as nothing, in my estimation, if I felt that my continuance in or retirement from the service would, to any material extent, affect the great struggle through which the country is now passing.

"If, therefore, I am permitted to retire from the army, I beg the Commanding General to feel assured that it is from no want of confidence either in the justice or ultimate triumph of the Union cause. That cause will always have the warmest sympathy of my heart, for there are no conditions upon which I will consent to a dissolution of the Union. Nor are there any concessions, consistent with the republican form of government, which I am not prepared to make in order to maintain and perpetuate that Union."

Upon his return from the Army, he received the unanimous nomination from what was then known as the Union party of Kentucky, for the office of Attorney General, and, following his election, he assumed his official duties at the Capitol of his state, until the fall of 1867, when he returned to the active practice of law in Louisville.

In 1871 he was induced to accept the unanimous nomination of the Republican party for the office of governor; and although he received a vote of nearly 50 per cent over the congressional vote for the Republican nominees of the previous

year in the state, he was compelled to yield to his opponent. The Republican convention of Kentucky in the following year presented his name as a candidate for the Vice Presidency, and in 1875 he further increased the Republican vote in



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JOHN MARSHALL HARLAN.

a renewed canvass for governor. In 1876 he was chairman of the Kentucky delegation at the Republican convention which nominated Rutherford B. Hayes for President of the United States. Following the election of Mr. Hayes, the latter offered him a diplomatic position as a substitute for the Attorney Generalship, to which, before he reached Washington, President Hayes intended to assign him. He was commissioned as an associate Justice of the Supreme Court of the United States on November 29th, 1877, and on December 10th of that year took his seat, serving in that position up until the time of his death, on the 14th day of October, 1911, with an unparalled record as a consistent representative of "the People of the United States." No man has so thoroughly understood or has so profoundly loved "the Constitution of the United States."

Among the opinions of the United States Supreme Court delivered by Justice Harlan, the following may be mentioned as covering subjects of great importance:

"Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Guy v. Baltimore, 100 U. S. 434, 25 L. ed. 743; Kirkland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567; Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; Robb v. Connolly, 111 U. S. 625, 28 L. ed. 542, 4 Sup. Ct. Rep. 544; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; Ex parte Royall, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Continental Wall Paper Co. v. Louis Voight & Sons Co. 212 U. S. 254, 53 L. ed. 497, 29 Sup. Ct. Rep. 280; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. He also delivered elaborate dissenting opinions in Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; and Hurtado v. California, 110 U. S. 538, 28 L. ed. 239, 4 Sup. Ct. Rep. 111, 292; United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Standard Oil Co. v. United States, 221 U. S. at page 82, 55 L. ed. 654, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. at pages 192, 193, 55 L. ed. 698, 699, 31 Sup. Ct. Rep. 632."

At the October term 1883 of the United States Supreme Court certain cases were brought before that court, bringing into question the first and second sections of the civil rights acts, and in an opinion written by Mr. Justice Bradley those sections were held to be unconstitutional as applied to the several states. From that decision a dissenting opinion was filed by Justice Harlan from which I quote the following:

"I hold that since slavery, as the court has repeatedly declared (Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515), was the moving or principal cause of the adoption of that Amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that Amendment by appropriate legislation, may enact laws to protect that people against the deprivation, because of their race, of any civil rights granted to other freemen in the same state; and such legislation may be of a direct and primary character, operating upon states, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the state."

In reference to the 14th Amendment he said, among other things, the following, quite applicable to modern-day conditions (Italics mine):

"To-day it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time *it may be that some other race will fall under the ban of race discrimination.* If the Constitutional Amendments be enforced according to the intent with which, as I conceive, they were adopted, there cannot be, in this Republic, *any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant.* The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freeman and citizens, because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, Congress has been invested with express power—everyone must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect." See Civil Rights Cases, 109 U. S. 36, 27 L. ed. 848, 3 Sup. Ct. Rep. 18.

On March 19, 1888, a decision was handed down by the United States Supreme Court in what was known as the Telephone Cases, 126 U. S. 531, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, and in which four of the seven justices sitting in that case (Mr. Justice Gray not being present at the argument, and Mr. Justice Lamar not then being a member of the court) held in favor of the validity of the patent granted to Alexander Graham Bell, while Justices Field, Bradley, and Harlan, in a dissenting opinion (126 U. S. 572 to 577, 31 L. ed. 795, 797, 8 Sup. Ct. Rep. 974) written by Mr. Justice Bradley, held that Daniel Drawbaugh was the original and first inventor of the telephone, and

that therefore the patent granted to Bell was void. Drawbaugh was a poor blacksmith residing at Eberley's Mills, Cumberland county, Pennsylvania, and he was only able to make the fight against the Bell Company because of the financial backing of what was then known as "the People's Telephone Company," in a suit brought by the Bell Company on the 20th day of October, 1880, the People's Company having filed an answer in January, 1881, setting up that Drawbaugh was "the original and first inventor and discoverer of the art of communicating articulate speech between distant places by voltaic and magneto electricity," and that "long prior to the alleged inventions by Bell, Gray, and Edison, he (Drawbaugh), then and now residing at Eberley's Mills, constructed and operated practical working electric speaking-telephones at said Eberley's Mills, and exhibited their successful operation to a great number of other persons resident in his vicinity and elsewhere." As the following quotations from the dissenting opinion appear to be typical of the character and literary style exemplified in the dissenting opinions written by Justice Harlan, and at the same time appear to give due credit to the attainments of Mr. Bell, it is deemed proper to here quote certain selections from that opinion:

"Mr. Justice Field, Mr. Justice Harlan, and myself are not able to concur with the other members of the court, sitting in these cases, in the result which has been reached by them. Without expressing an opinion on other issues, the point on which we dissent relates to the defense made on the alleged invention of Daniel Drawbaugh, and applies to all the cases in which that invention is set up. We think that Drawbaugh anticipated the invention of Mr. Bell, who, at most, is not claimed to have invented the speaking telephone prior to June 10, 1875. We think that the evidence on this point is so overwhelming, with regard both to the number and character of the witnesses, that it cannot be overcome. As this is a question of fact, depending upon the weight of the evidence, and involves no question of law, it does not require an extended discussion on the part of those who dissent from the opinion of the majority—which is very ably drawn, and presents the case with great clearness and force. On the point mentioned, however, we cannot concur in the views expressed. . . .

"We are satisfied from a very great preponderance of evidence, that Drawbaugh produced, and exhibited in his shop, as early as 1869, an electrical instrument by which he transmitted speech, so as to be distinctly heard and understood, by means of a wire and the employment of variable resistance to the electrical current." . . .

"We are also satisfied that as early as 1871, he reproduced articulate speech, at a distance, by means of a current of electricity, subjected by electrical induction to undulations corresponding to the vibrations of the voice in speaking—a process substantially the same as that which is claimed in Mr. Bell's patent.

"In regard to the instrument in which the principle of variable resistance was used, more than seventy witnesses were examined, who either testified to having seen it and heard it, or established such facts and circumstances in relation to it as to put its existence and date beyond a question. With regard to the instrument in which electrical induction was employed to produce the requisite undulations, some forty or fifty witnesses were produced, many of whom saw it and heard speech through it, and others either saw it, or heard it talked about in such a manner as to fix the time when it was in existence. . . .

"We do not question Mr. Bell's merits. He appreciated the importance of the invention, and brought it before the public in such a manner as to attract to it the attention of the scientific world. His professional experience and attainments enabled him to see, at a glance, that it was one of the great discoveries of the century. Drawbaugh was a different sort of man. He did not see it in this halo of light. Had he done so, he would have taken measures to interest other persons with him in it, and to have brought it out to public admiration and use. He was only a plain mechanic, somewhat better instructed than most ordinary mechanics; a man of more reading, of better intelligence. But he looked upon what he had made more as a curiosity than as a matter of financial, scientific, or public importance. This explains why he did not take more pains to bring it forward to public notice. Another cause of his delay in bringing his invention to public notice was, that he was ever indulging the hope of producing speech, at the receiving end of the line, loud and distinct enough to be heard across a room, like the voice of a person speaking in an ordinary tone.

"It is perfectly natural for the world to take the part of a man who has already achieved eminence. No patriotic Briton could believe that anybody but Watt could produce an improvement in the steam engine. This principle of human nature may well explain the relative feeling towards Bell and Drawbaugh in reference to the invention of the telephone. It is regarded as incredible that so great a discovery should have been made by the plain mechanic, and not by the eminent scientist and inventor. Yet the proof amounts to demonstration, from the testimony of Mr. Bell himself, and his assistant, Watson, that he never transmitted an intelligible word through an electrical instrument, nor produced any such instrument that would transmit an intelligible word, until after

his patent had been issued; whilst, for years before, Drawbaugh had talked through his, so that words and sentences had again and again been distinctly heard. We do not wish to say a word depreciatory of Mr. Bell. He was original, if not first. He preconceived the principle on which the result must be obtained, by that forecast which is acquired from scientific knowledge, as Leverrier did the place of the unknown planet; but in this, as in the actual production of the thing, he was, according to the great preponderance of the evidence, anticipated by a man of far humbler pretensions. A common astronomer, by carefully sweeping the sky, might have been first in discovering the planet Neptune; whilst no one but a Leverrier, or an Adams, could have ascertained its existence and position by calculation. So it was with Bell and Drawbaugh. The latter invented the telephone without appreciating the importance and completeness of his invention. Bell subsequently projected it on the basis of scientific inference, and took out a patent for it. But, as our laws do not award a patent to one who was not the first to make an invention, we think that Bell's patent is void by the anticipation of Drawbaugh."

Mr. Albert H. Walker, in his work on the "History of the Sherman Law" (copyrighted in 1910), on pages 301 and 302, briefly reviews the work of the late Justice Harlan in connection with the decisions interpreting and enforcing that law by the Supreme Court as follows:

"The senior Associate Justice of the Supreme Court is Justice Harlan, who has been an eminent member of that tribunal nearly thirty-three years. He has participated in the hearing of every one of the seventeen cases relevant to the Sherman law which have yet been decided by the Supreme Court, except the Bement Case. He delivered the opinion of the Supreme Court in the Northern Securities Case and in the Continental Wall Paper Case, in each of which the accused combination was held to be illegal; and he concurred in each of the other eight cases in which similar decisions were rendered; and he dissented from the decision which was rendered by a majority of the Supreme Court in favor of the defendants, in each of four of the seven cases in which the defendants, though accused thereof, were not found guilty of violating the Sherman law. His contributions to the literature of the Sherman law, in the two cases in which he delivered the opinion of the Supreme Court, and in the four cases in which he dissented, are extensive and learned and eloquent arguments in support of the validity and value and comprehensive scope of that statute. No one who is acquainted with the general subject, and who reads those contributions, can fail to conclude that Justice Harlan may be expected to give his vote in the Supreme Court in favor of deciding the Standard Oil Case and the American Tobacco Case against those defendants."

Mr. Walker's expectations as to the position likely to be assumed by Justice Harlan in the decisions in the Standard Oil Case and the American Tobacco Case, then pending before the Supreme Court, were fulfilled, but Mr. Justice Harlan again found it necessary to file vigorous dissenting opinions in order to consistently follow his previous record.

In his disenting opinion in the Tobacco Trust Case, 221 U. S. at pages 192 and 193, 55 L. ed. 698, 699, 31 Sup. Ct. Rep. 632, Justice Harlan says:

"By every conceivable form of expression the majority in the Trans-Missouri and Joint Traffic Cases adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which has been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say, what, as I think, it plainly did not intend to say, and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce, even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the government has exclusive cognizance. I beg to say that, in my judgment, the majority in the former cases were guided by the "rule of reason," for it may be assumed that they knew quite as well as others what the rules of reason require when a court rules to ascertain the will of Congress as expressed in a statute. . . .

"Let me say also, that as we all agree that the combination in question was illegal under any construction of the anti-trust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word 'unreasonable' or 'undue.' All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta,* pure and simple.

"These views are fully discussed in the dissenting opinion delivered in the Standard Oil Case" (221 U. S. 82, 55 L. ed. 654, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734). In his dissenting opinion in the Standard Oil Case at page 83, he says:

"All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that

the country was in real danger from another kind of slavery sought to be fastened on the American people, namely,—the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration." . . .

"Guided by these considerations, and to the end that the people, so far as interstate commerce was concerned, might not be dominated by vast combinations and monopolies having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the anti-trust Act of 1890 in these words (then quoting sec. 1 of the act, 26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820)."

For more than twenty years Justice Harlan was a lecturer on constitutional law at the Columbian (now George Washington) University, in Washington, D. C. No lecturer has ever yielded a greater influence on a law-student body. "To hear him was to love him." To him the Constitution was like unto a Bible,—a sacred thing. The writer remembers well on one occasion when he touched upon a popular constitutional question the students burst into tumultuous applause. With his typical worried and disapproving expression on such occasions, he rapped for order, saying:—"Come, come, I am not delivering a political speech." The thousands who have heard him lecture on this subject will remember how it annoyed and worried him to be interrupted by applause. It has been well and truthfully said of Justice Harlan than when on the bench no justice was more serious or dignified, and when off the bench or in civil life, none more democratic or cordial. He was a great man physically as well as mentally, as many of this world's greatest men have been; to his very striking and commanding presence was united the genial manners of his old Kentucky home.

During his service on the bench, a magazine writer described him as follows:

"He is a sort of living, breathing, dominating incarnation of pure Americanism, an inspired Apostle of Law, Morality, and Order. It has been well said of him that he goes to bed at night with the Bible in one hand and the Constitution in the other. . . . His full seventy-three inches of commanding body; his gray eagle of a face, surmounted by a massive dome of a head; his enormous voice, which has the ring of a deep toned bell,—all combine in a compelling and unforgetable presence."

Associate Justice Harlan died in Washington on October 14, 1911, at the age of seventy-eight, after an illness of less than a week, and at the time of his death was the oldest member of the United States Supreme Court, and his term of service had been exceeded by only two justices in the history of the court,—Chief Justice Marshall, after whom he was named, and Associate Justice Stephen J. Field.

During the term of his service twenty Supreme Court justices were appointed by successive Presidents, and, including the eight who were on the bench at the time of his appointment, Justice Harlan had been associated with twenty-eight justices out of the sixty-five who had served since the foundation of the government.

As a Man, a Soldier, a Lawyer, a Justice, and a Statesman, he left a record without a blemish, a character without reproach, and a reputation which but few, of any, members of the bar or of the bench, have attained. Justice Harlan seems to have adopted and to have carefully followed the following words of Abraham Lincoln:

"I am not bound to win, but I am bound to be true.
"I am not bound to succeed, but I am bound to live up to what light I have.
"I must stand with anybody that stands right; stand with him while he is right, and part with him when he goes wrong."

Like Abraham Lincoln, his fame and worth will grow and become accelerated with the flight of time and the onward march of progress, and he will ever be revered as one of the true "Immortals of the Law."

Edd B. Dillman

Immortals of the Law

Great souls there are with lives sublime,
The mental giants of our time,
Who in majestic courses move
The commonplace to rise above,
And with a sage's guiding hand
The honors of the world command.

They give to flattery's tongue no ear,
Nor live of Kings nor mobs in fear,
But fearlessly their duty do
Serenely, fairly, firmly, true,
Keep well the ermine clean and pure,
And bid the rights of men endure.

They are no weakling serfs who crawl
To judgment seats in tainted hall,
And play a shameful Jeffreys' part,
Mere coward hirelings at heart,
To trace upon a hateful page
The venal rantings of their age.

But just opinions firmly based
On law and logic; well are traced
And show the independent thought
Of jurists able and unbought
The fairest fruits of heart and mind
To aid the progress of mankind.

Do passions cries the law assail,
Would lawlessness and force prevail
To break fair Freedom's bulwarks down
And on the reign of reason frown?
Firm as the adamant they stand
For Justice and a freeman's land.

By lust for power tempted not
Desire for glory all forgot —
Devoted to a righteous cause
They strive to well declare the laws,
That rich and poor and high and low
Protection of the law may know.

Wherever Judges may preside,
Be this the worthy lawyer's pride —
The law and Justice to maintain
Regardless of all loss or gain,
And aiding every Judge to be
Deserving immortality.

Wm D Fetter

Photo by Boston Photo News Co.

STATUE OF CHIEF JUSTICE MARSHALL, BY STORY, AT WASHINGTON.

John Marshall

*BY HUGH H. BROWN**

of the Tonopah (Nev.) Bar

IN Washington, I stood in front of a monument on the terrace of the Capitol. The pedestal is inscribed as follows: "John Marshall, Chief Justice of the Supreme Court of the United States. Erected by the Bar and by the Congress of the United States."

The great dome of the Capitol arose behind the stately figure, and as I stood in the shadow of both, I tried to grasp the significance of it all.

I thought of the President and his Cabinet, whose subjection to law was determined by John Marshall. I thought of the Supreme Court of the United States, whose broad jurisdiction was delineated by him. I thought of the Senate and the House, the members whereof represent states whose symmetrical position in the Union was defined by him. I thought of all our fellow countrymen, the ark of whose covenant rested beneath that towering dome, and whose country, because of John Marshall,—instead of being a Confederation of discordant states—had been fused into an everlasting Union, powerful to fulfil its mission in the world's work and to maintain its primacy in the congress of the world's chancelleries.

When he first came to his high seat upon the Supreme Court, the court was without prestige and almost without litigants. Justices had retired from it to accept commissions upon state courts. When Jay declined the Chief Justiceship, after his retirement, he declared that the court "lacked public confidence and respect." The Chief Justiceship went begging. Strong men avoided it. Marshall successively recommended it to others. He did not seek it for himself. Jay had said, "When I left the bench I was perfectly convinced that under a

* Remarks before Nevada Bar Association.

system so defective the court could not obtain the energy, weight, and dignity which was essential to its affording due support to the national government.

Soon thereafter, Marshall accepted the commission. When he left the court, a generation later, the court had become, ever since has been, and forever will be, the greatest tribunal in the world.

He found the Constitution an experiment. He perfected it. He found its fabric plastic. He left it adamant.

When he pronounced his decision in Marbury's case, the recent doctrine of the French Revolution was saturating the young Republic,—the doctrine of the absolute right of the people to rule. In substance he said to Congress, to the peoples' delegates, "If you enact a law in conflict with the Constitution, it is utterly void. This court, though only a coordinate branch of the government, has a right to declare it void and to pronounce a final judgment, binding upon all people and upon all states." And to a head of one of the executive departments, acting under the immediate orders of the President, he said, "You too, are subject to the mandate of the Constitution; and whenever you attempt to trespass upon the right of an individual your hand will be stayed; for be it known this is a government of laws, and not of men."

His concept was a mighty Federal government, complete with every national power. He succeeded in establishing the principle only after a struggle and in the face of bitter opposition. Threatened impeachment was hurled at the Federal judiciary, and amendments were proposed to substitute fixed terms in place of life tenure, and removal on the address of two thirds of both houses.

Jealousy and hatred hedged the court.

Behold what a change followed in Marshall's wake, and ever since has prevailed. Now the whole nation awaits in calm patience, and receives with loyal acquiescence, every utterance of the court.

We know that the attitude of the whole nation toward the court is something superlatively fine. It was expressed in some small measure a few years ago by a former ambassador to the Court of St. James, when he said in substance, as I now recall it:

"Many a plain man never has seen the court or ever expects to see it. He knows nothing of its formulas and procedure. He regards it as a remote and austere presence. Yet he feels that if ever things should come to the worst,—if oppression and wrong should gain the ascendancy and injustice stalk abroad in the land, and all else failed him; nevertheless his humble roof, and all things dear that are sheltered beneath it, would find, somehow, someway, a final refuge, protection, and remedy in the Supreme Court of the United States."

Time has vindicated the wisdom of the principle in Marbury's case,—the power of the judiciary to declare void a legislative act in conflict with the Constitution.

In these days that are now upon us, when malefactors, both corporate and individual, stand at the bar of Federal courts, charged with infractions of the law, it is well for us to remember that the states themselves have a long record of lawlessness.

The Federal Reports show over 150 violations of the fundamental law, by the states, checked and reprimanded by the mandate of the Federal judiciary, applying the principle in Marbury v. Madison.

If greatness consists of great ability linked with great opportunity, then we must pass unchallenged the declaration that Marshall is the greatest judge in the language. No English judge ever had the opportunity of a new field except Hardwicke in equity, Mansfield in commercial law, and possibly Stowell in admiralty. The world never had known a science of a written constitution of government until it came in Marshall's time.

Standing before his portrait, in company with a distinguished foreigner, an American lawyer said, "We consider him the greatest judge of our country." A British justice replied, "You might well say the greatest judge of any country."

Another Englishman, James Bryce, said, in substance, that the higher qualities of Marshall's decisions never had

been surpassed and rarely equalled by the most famous jurists of modern Europe or of ancient Rome.

If no other name than Marshall's had glorified Anglo-Saxon jurisprudence, it would be sufficient to brand the practice of the law as a noble profession, an unequaled privilege and an endless delight.

The Man.

Many years' practice at the bar, together with sundry activities in public service, preceded his elevation to the bench at the age of forty-five. His career as a judge is so towering that we forget the many high places in the first half of his life. We forget that he carried his sword unsheathed for six years, and was of that company who left the tracks of their bloody feet on the snows at Valley Forge. We forget that he was a leader of the bar with a national reputation. We forget that Presidents esteemed him a great diplomat and held him entitled to the approbation of the whole country because of his conduct of the negotiations with the French Directory. We forget that Marshall was the draftsman of the resolutions which confused Tallyrand, and that at a public banquet, given upon his return with Pinkney and Gerry, the historic slogan was coined, "Millions for defense, not a cent for tribute." We forget that Wirt said of him, while he was still at the bar, "He deserves to be considered one of the most eloquent men in the world."

At heart he was a lawyer, a practitioner. After each public service he eagerly returned to the bar with renewed determination to give the rest of his life to it.

In the great case of the Virginia debts, in the Supreme Court, his righteous victory at the Bar inspired the memorable couplet:

> "Called from death by Marshall's power,
> The ghosts of murdered debts arise."

Next to his judicial genius we owe most to his courage,—the sheer physical, moral and intellectual courage of the man of red blood. Public clamor, partisan snarls, and the teeth of the mighty, had no terrors for him. A colleague on the bench said of him, "He would not avoid to do right, though it brought on him the whole artillery of libels."

This aspect of his character is too often lost sight of when we read the placid paragraphs of his great decisions; nothing in their text shows the human bitterness of the times. But in the annals of institutional history, posterity's report must put the silent, irresistible courage of Marshall close beside that of Washington and Lincoln.

This reminds us of some of the qualities of the plain man. It was said that at one period, during the early days when it was the habit of the Justices to dine daily together, some of them were considerably addicted to drink. Chief Justice Marshall is said to have answered the charge by saying that they drank only on rainy days. But a chronicler of the times, without vouching for the story, alleges that the facts were as follows:

When the Justices were seated around the dining table, it was the duty of Justice Story to go to the window and report the condition of the weather. If he reported a rainy day the wine was ordered. If he reported fair weather, the old Chief would reply, "It may be true that the sun is shining to-day in Washington; but the territorial jurisisdiction of this court is so extensive that, under the rule of probabilities, it is raining somewhere in our domain. Brother Story, you may order the wine."

It is a loss to any nation to have the flight of years erase the little human burrs from the faces and the characters of its great men. We love Lincoln for the wart on his face and the rugged outline of his countenance. If Washington had a wart on his face, time and art have erased it, leaving only the ideal lines of tradition. Posterity will better appreciate Marshall and will draw deeper inspiration from his life if it remembers that lofty qualities were linked with the attributes of the plain man.

In the depths of his anguish, a few months after the death of his Chief, Mr. Justice Story said of him, "So much of everything to love and admire, with nothing, absolutely nothing, to regret.

No follies to be apologized for; no vices to be blushed at; no dark deeds disturbing the peace of families. I shall never look upon his like again."

Many years later, addressing the first session of the American Bar Association in 1879, Edward John Phelps said, "Lives enough have been written that never were worth living. But the life of this great magistrate is unwritten still. . . . Let no prentice hand essay the task! He should possess the grace of Raphael, the color of Titian, who shall seek to transfer to enduring canvas that most exquisite picture in all the receding light of the days of the early Republic."

The only obligation to his profession that Mr. Phelps failed to discharge was to write the biography of John Marshall.

He was a master of simple language. There was no folly of old phrases nor irrelevant eloquence. There was not the thinnest veil between his mind and the mind of the reader. The layman could read his decisions as well as the lawyer. If it had been otherwise,—if the people had failed to understand,—if they had been mystified,—the country might not have acquiesced in those critical early days.

Answering Luther Martin's taunt in Burr's case, in the concluding portion of his charge to the jury (and what could be simpler, yet more majestic and conclusive?), he said: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true."

Again, in the same case, charging the same jury,—and let us remember that it was in the face of a national clamor for Burr's blood,—great judge that he was, great lawyer that he was, not even the roar of a nation disturbed the judicial poise nor deflected a hair's breadth the intellectual and moral courage of the man, for he gave to that jury the definition of treason as it was then prescribed by the Constitution, even though it saved Burr's life; he measured the full burden of his own sense of responsibility when he said in simple, masterful words, "No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty, or the opprobium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

He attended Virginia's Constitutional Convention in the seventy-fifth year of his age. If ever a clear shaft of light was cast athwart the dark heresy of the recall of judges, it was Marshall's plea for the independence of the judiciary and tenure during good behavior, when he said to that assembly:

"Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? You do not allow a man to perform the duties of a juryman or a judge if he has one dollar of interest in the matter to be decided; and will you allow a judge to give a decision when his office may depend upon it? When his decision may offend a powerful and influential man? And will you make me believe that if the manner of his decision may affect the tenure of that office, the man himself will not be affected by that consideration? I have always thought, from my early youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."

The least we can do is to hearken to the admonition of his genius, which bids us be lawyers, sound constitutional lawyers; and be, as Wirt again said of him while he was still at the bar, "A fellow who would not depart one step from the right line of his argument though a Paradise arose to tempt him."

By whatsoever distant shore his great soul tarries, he knows that his countrymen love him. If ever there be a future hour of juridical crisis in the Republic, we pray the God of Nations to give us another leader like him.

A Roman Advocate

BY HON. PETER W. MELDRIM*

of the Savannah (Ga.) Bar; President of the American Bar Association 1914—1915

IN 1902 the President of the American Bar Association was not only a great lawyer, but a finished scholar, a good citizen, and "the most courteous of men and truest friend." In the course of his annual address, Judge U. M. Rose, of Arkansas, said that "Rome still rules the world from the ruins of the Forum." While this was said in a wide sense, yet it is true that there is no place anywhere that is so full of absorbing interest to the American lawyer as the Roman Forum; for there was much in the life of the Roman Republic that gave inspiration to this American Republic. But neither of the glory or the shame of the Forum, nor of the rise or fall of the Roman people, can I speak to-day, for the field is too broad to be gleaned within the limits of the hour. All I can hope to do is to sketch the character of the man who was the most conspicuous ornament of that Forum, and the most distinguished lawyer of that Roman law which, in its later development, under the name of the civil law, has become the basis upon which rests the jurisprudence of the Latin, the Slav, the Scandinavian, and the Teuton.

Marcus Tullius Cicero was born at Arpinum, the same place where Marius was born, and in the same year with the great Pompey, 107 B. C. It is said that clouds take shape and form from the surface of the earth over which they pass; it is true that men take tone and color from the times in which they live. To judge of any man, his words, or acts, reference must always be had to his environment. Cicero was the natural outcome of the age in which he lived. Belonging to the Equestrian order, he came from the strong blood strain of the Volscian country stock. His father a man of education and accomplishment, his mother a woman of the nobility, and of more than usual strength of character, Cicero, like most of the Roman youth, was ambitious; and at that time in Rome, as we have seen it in this Republic, the stations of honor in the state were best reached through the avenues of the law. There was much in the genius and life of Rome at that time to excite ambition. Every citizen had a voice in the government. The constitution was republican. The citizens were divided into three orders, Senatorial, Equestrian, and the People. Roman citizenship varied in the rights that were accorded to the different classes. In addition to those who possessed the full rights of citizenship, foreigners were granted privileges and protection; the Italians were admitted to citizenship under certain restrictions; the people of the conquered Roman provinces secured lesser civil rights, while to the freedmen or manumitted slaves was accorded more or less political power; but it is interesting to note that "their exact status was a standing subject of controversy in politics."

In so complex a system of political rights, there necessarily arose grave questions affecting not only individuals, but classes, and requiring resort to courts and arms to determine them.

The government of Rome changed from time to time, but generally we can distinguish in its several forms our own divisions into legislative, judicial, and executive. The legislative functions in the days of Cicero were exercised by the public assemblies,—the comitia, presided over by the consul, prætor, or tribune. These assemblies elected magistrates and made laws. The senate, at first a council, gradually assumed legislative power and discharged executive functions.

*Address before the Florida Bar Association.

There was one interesting fact in connection with the Roman Senate, and that was, that a senator was not confined to giving his opinion on the question under discussion. In this respect, Middleton's remark in his life of Cicero appears true, that "human nature has ever been the same in all ages and nations."

With the various officers in the Roman state, we have no present concern, but there was one principle applicable to the consulship which was vital to the public life of Cicero, and that was, while a consul could do anything during his term of office, and no one could question it, yet after his term had expired he could be held answerable for his conduct.

Passing from the body of the Roman people and their officers, a glance must be cast on their courts. Naturally, their business was divided into civil and criminal. Originally, jurisdiction in both civil and criminal matters belonged to the King, but civil matters passed to the consuls and prætors, and important cases were transferred to the assemblies of the people. There was a presiding judge, a jury, the members of which were drawn by lot from the body of jurors, the right of challenge existed, a majority of the jury found the verdict, the president or judge had no vote, and he did not decide the law. The jurors voted by ballot, A (absolvo) not guilty, or C. (condemno) guilty.

Cicero was not only a lawyer trying causes in the courts, but he was actively engaged in public life, filling the great offices of quæstor, ædile, prætor and consul. How full of difficulty that life was, can best be understood when we reflect that two years after he assumed the toga virilis, he saw the first Civil War begin and Marius become a fugitive. He saw the same Marius return to Rome and become consul for the seventh time. He saw that Marius die and Rome fall into the hands of Cinna. He saw Cinna murdered, and Sulla overthrow the Marian party. He beheld Sulla dictator, and saw Spartacus die. He saw Pompey when he went forth to meet Mithridates, and saw him again after his return, forming the First Triumvirate with Cæsar and Crassus. He beheld his mortal enemy Clodius made tribune, and he found himself driven into exile. Returning from exile, he defended Milo for the murder of Clodius, and went as pro consul to Cilicia. Upon his return to Rome, he beheld Cæsar crossing the Rubicon, and saw him made dictator. He looked upon the mighty struggle between Cæsar and Pompey. His efforts for peace were unavailing. The clash of resounding arms drowned the voice of the orator. Pharsalia was fought. Pompey was dead. Cæsar was master and dictator. Cicero looked now upon the mightiest struggle for political power that the world has even seen. Cæsar is made dictator for life, and falls at the foot of Pompey's statute. The contest between Antony and the Roman Senate began. Cicero thundered his philippics against Antony. The Second Triumvirate was formed. Cicero was proscribed, and, fleeing, was murdered.

Any reflections which may be made upon the conduct or character of Cicero should have due regard to the tremendous forces that were operating upon him during his entire public life. To me the most surprising thing is that in the general corruption of official life, he should have been clean and honest, and that amid war's almost constant alarms he could have made himself the foremost orator and scholar of his time. It was this thought that led to the preparation of this paper,—the desire to find out how it was that under the circumstances, in some respects so uncongenial to oratory, and in all respects so opposed to philosophic thought, that Cicero could have made himself not only the foremost of all orators, with perhaps the single exception of Demosthenes, but could have given to the world his letters, epistles, orations, and works.

It is true that Cicero was possessed of a superior mind, but we must dig deeper than that to find the sources of his power. Sent to the public schools of Rome, he gave promise of excellence, and, being destined for the bar, he was taught philosophy by Philo, the Academician, and Phædrus, the Epicurean. Diodorus, the Stoic, exercised him in argumentative subtleties, and Antiochus instructed him in the philosophy of

Plato. The poet Archias was one of his instructors, and oratory was practised by him under Molo, the foremost rhetorician of his day. The orators Antonius and Craussus aided and encouraged him. The great actors Æsopus and Roscius were studied by him. He declaimed daily with his competitors in Latin and Greek, and he frequented the Forum. Scævola, the celebrated lawyer, was his legal preceptor, and he saw service in the field under Pompeius Strabo. Adding to the advantages of the schools the benefits of travel, he spent two years in foreign lands, and returning to Rome, began the practice of his profession, in which he became the greatest advocate of all times.

It thus appears that Cicero was carefully prepared for the bar, and he himself affords the most striking illustration of the truth of his saying, when speaking of oratory, that "no man ought to pretend to it, without being previously acquainted with everything worth knowing in art or nature." But mere knowledge is not sufficient for success as an advocate. There must be that due appreciation of the true relation which one fact or one principle bears to every other fact and every other principle involved in the discussion. There must be a sense of legal perspective; the skill to present effectively the strong points in a case, and the art to conceal the weak ones. Teuffel ascribes to Cicero "an extraordinary activity of intellect, a lively imagination, quickness, and warmth of feeling, a marvelous sense of form, an inexhaustible fertility of expression, an incisive and diverting wit, with the best physical advantages." As to his "Form," he speaks of it as "clear, choice, clean, copious, appropriate, attractive, tasteful, and harmonious." "The whole range of tones from light jest even to tragic vehemence was at his command, and especially did he excel in an appearance of sincerity and emotion, which he increased by an impassioned oratory." Ben Johnson says: "Cicero is said to be the only wit that the people of Rome had equalled to their Empire."

Alciati regarded Cicero as the very begetter of eloquence, *parens eloquentiæ*, and Gibbon says that "the jurisprudence of his country was adorned by his incomparable genius, which converts into gold every object that it touches."

It is true that the times have changed since the days of Cicero, but the power of clean, strong, forceful, and ornate speech is as great to-day as when he in the Forum defended Roscius or prosecuted Verres, or from the Senate drove forth Catiline. The same advancement which came to the Roman socially, professionally, and politically from splendid oratory comes to-day to the cultivated and accomplished American orator. There is in a great oration a plan as complete as that in architecture, a form as noble as that in sculpture, an expression as true as that in painting, a harmony as perfect as that in music. It does not follow that true oratory fails to be appreciated by a practical people. The Romans were essentially practical. While mere display and affectation find no support at the bar, or before the people, or in deliberative assemblies, yet directness, force, and good taste continue to convince and persuade. A false school of oratory, that of repression,—false because it is not natural,—is corrupting our youth, and of that school I might say, as Cicero said of Calvus, "Though he handled his style with knowledge and good taste, yet being too critical of himself, and fearing to acquire unhealthy force, he lost even real vitality."

It would be interesting, but time forbids, to consider certain of Cicero's orations; to study his rare power of analysis, his careful preparation of the facts, and the consummate skill shown by him in the defence of Roscius, and in the prosecution of Verres. To me his oration on the Manilian law seems the perfection of popular speaking. A public career was sought by every ambitious Roman. Cicero had used the bar as so many lawyers have since done, to secure political preferment. Cicero was henceforth to be the politician. The great question submitted to the people was, "Shall Pompey be given command over all the East." Mithridates had not been conquered. Glabrio had failed, and Rome's domain had been invaded. Such a grant of power as Cicero sought to have conferred on Pompey was incon-

sistent with the republican institutions of Rome, and in contravention of the authority of the Senate. With what marvelous skill does the consummate orator approach this difficult question! It is his first political speech, and with apparent sincerity he rejoices that, unpractised as he is in political speaking, he has for his subject "the valor and ability of Pompey." He strikes with a master's hand every chord of the popular heart, from that which thrills with Roman dignity, pride, and glory to that which only answers to the sordid avarice, greed, and gain of the populace. The picture that he drew of the great Pompey has not lost its color in all the centuries that have passed. In a great commander, said he, four things were necessary:

Scientia; knowledge and experience.

Virtus; incorruptibility, self-restraint, wisdom, eloquence, good faith and humanity.

Auctoritas; influence, prestige.

Felicitas; that subtle good fortune, that undefined and indefinable gift of the gods which in man is like the gleam of the sabre, both attractive and dangerous, and in woman, surpassing all beauty of face or form, is the greatest force in nature. This power, born we know not how, but springing full-armed into being at the moment of its birth, endows with infinite grace the simplest acts, tunes to the ear the crudest speech, wins from prejudice approving smiles, and conquers in senate, camp, and court.

We are now for a few moments to deal with Cicero as the politician. Personally, he was pure and amiable, virtuous, generous, and kind, bearing himself with dignity and without ostentation, but there was nothing Arcadian in his methods. He learned the names and residences of the prominent citizens, he courted his people, he had a *nomenclator* whose business it was to inform him as to the names and occupations of persons, he made a personal canvass for votes, mixed with the people, went into Cisapline Gaul to get votes, gave a year to private solicitation for popular support, wore the customary habit of the candidate, and for the first time in Roman history, *a novus homo,* with no other recommendation than his eloquence and his merit as a civil magistrate, became consul.

As consul, Cicero showed excellent judgment, for while he has been criticized for having passed no laws except one to check bribery at elections, it should be remembered that an evil then existing in Rome was a multiplicity of laws. Cicero was a self-made, scholarly lawyer, depending upon his own exertions, and he brought to the discharge of his consular duties the good sense of the trained advocate. His conduct during the conspiracy of Catiline was characterized by the very best judgment. The world is still ringing with the eloquent words that drove Catiline from the Senate, but the controlling force was not eloquence, but evidence. Catiline had conspired to bring the Gauls into Rome. How could the conspiracy be proven? It was discovered that the conspirators were writing letters to each other. These letters were intercepted, and Cicero, with the training of the lawyer, produced them in the Senate with the seals unbroken. They were there opened, proof of their genuineness was made, and the conspiracy was exposed. Cæsar declared that the state had been saved by the diligence of the consul,—and, referring to the proscription under Sylla, added: "They might feel sure that no such consequences need be feared under Cicero." Pompey declared in the Senate that Cicero was the "saviour of the world." Even Froude, who seeks at times to degrade Cicero that he may exalt Cæsar, says that Cicero had acted in this great emergency "bravely, and had shown as much adroitness as courage."

Macaulay in his essay on Bacon criticises Middleton's Life of Cicero in language the severity of which reflects upon the critic. Dr. Middleton was a distinguished divine, and while his Life of Cicero is partial it is due to him to say that in his preface he declares that "I have taken care always to leave the facts to speak for themselves, and to affirm nothing of any moment, without authentic testimony to support it."

That Cicero was vain is true, and that he was at times apprehensive of his personal safety and doubtful of the perpetuity of the Republic, is also true, but

there were other times when he was modest, and times when he showed the highest moral and political courage. Froude, who cannot be charged with partiality to Cicero, declares that Cicero was not subservient to Sylla, as he took an early opportunity of showing, and that he gave free expression to his thoughts when free speech was still dangerous. Cicero's first speech of importance was against the immediate friends of the dictator, and was an exposure of the iniquities of the proscription. When it was supposed no Roman advocate would dare defend young Roscius, Cicero undertook the defense, and by his eloquence and courage acquitted the youth. In the defense of Roscius he had the high courage to warn the Roman Senate of its vices and follies, notwithstanding that Cicero's ambition was to become a member of that body.

Few of us have rightly appreciated the moral force exercised by Cicero in the prosecution of Verres. Verres held his province for three years. He was supreme judge in all civil and criminal cases. He negotiated with the parties to every suit which was brought before him, and then sold his decisions. He confiscated estates on fictitious accusations. The island was rich in works of art. Verres had a taste for such things, and seized without scruple the finest productions of Praxiteles or Zeuxis. If those who were wronged dared complain, they were sent to forced labor at the quarries, or, as dead men tell no tales, were put out of the world. He had an understanding with the pirates, which throws light upon the secret of their impunity. A shipful of them were brought into Messina as prisoners, and were sentenced to be executed. A handsome bribe was paid to Verres, and a number of Sicilians whom he wished out of the way were brought out, veiled, and gagged, that they might not be recognized, and were hanged as the pirates' substitutes. By these methods Verres was accused of having gathered out of Sicily 322,916 pounds. Two thirds he calculated on having to spend in corrupting the consuls, and the court before which he might be prosecuted. The rest he would be able to save, and with the help of it to follow his career of greatness through the highest offices of the state.

Thus he had gone on upon his way, as he supposed secure from punishment. One of the consuls for the year, and the consuls for the year which was to come, were pledged to support him. The judges would be exclusively Senators, each of whom might require assistance in a similar situation. The chance of justice on these occasions was so desperate that the provincials preferred usually to bear their wrongs in silence rather than expose themselves to the expense and danger of almost certain failure. But, as Cicero said, the whole world inside the ocean was ringing with the infamy of the Roman senatorial tribunals.

Cicero, whose honest wish was to save the Senate from itself, determined to make use of Verres's conduct to shame the courts into honesty. Every difficulty was thrown in his way. He went in person to Sicily to procure evidence. He was browbeaten and threatened with violence. The witnesses were intimidated, and in some instances murdered. The technical ingenuities of Roman law were exhausted to shield the culprit. The accident that the second consul had a conscience, alone enabled Cicero to force the criminal to the bar. But the picture which Cicero drew and held up before the people, proved as it was to every detail, and admitting of no answer save that other governors had been equally iniquitous and had escaped unpunished, created a storm which the Senate dared not encounter. Verres abandoned his defense and fled, and part of his spoils was recovered.

Macaulay denounces Dr. Middleton as "composing a lying legend in honor of St. Tully," and adds: "He was holding up as a model of every virtue a man whose talents and acquirements, indeed, can never be too highly extolled, and who was by no means destitute of amiable qualities, but whose whole soul was under the dominion of a girlish vanity and a craven fear. Actions for which Cicero himself, the most eloquent and skilful of advocates, could contrive no excuse, actions which in his confidential correspondence he mentioned with remorse and

shame, are represented by his biographer as wise, virtuous, heroic. The whole history of that great revolution which overthrew the Roman aristocracy, the whole state of parties, the character of every public man, is elaborately misrepresented, in order to make out something which may look like a defense of one most eloquent and accomplished Trimmer."

Macaulay says that Dr. Middleton "had an uneasy consciousness of the weakness of his cause, and therefore resorted to the most disingenuous shifts, to unpardonable distortion and suppression of facts."

That Cicero boasted he had saved Rome may be true, but my observation has been that few men in public life are modest and retiring. Each state in this Republic has some favorite son who, according to his own opinion, has at some time saved his state. Certain men think that they have saved the state several times, and are always willing to save it again. The true character of a man is frequently best learned through the little things of life. Thus, when Cicero, writing of himself to Atticus, said: "I have been own brother to an ass," it would seem as if he were not always in conceit with himself. When the Senate decreed him a triumph he expressed a noble sentiment when he said, "He had rather follow Cæsar's chariot wheels in his triumph if a reconciliation could be effected between him and Pompey." It has been charged that Cicero was inconsistent. This charge may be true, but it is interesting to hear what Cicero has to say about it. He said: "When the first person in the Commonwealth was Pompey, whose services had been so conspicuous, whose advancement I had myself furthered, and who stood by me in my difficulties, I was not inconsistent if I modified some of my opinions, and conformed to the wishes of one who has deserved so well of me." To Lentulus, Cicero wrote: "Those who have played a great part in public life have never been able to adhere to the same views on all occasions."

In a time of cruelty, when public men debauched the populace with bloody contests in the arena, Cicero asked: "What pleasure can a sensible person find in seeing a clumsy performer torn by a wild beast, or a noble animal pierced with a hunting spear?" In a day of corruption he was honest. In a night of vice, he was virtuous. I have nowhere found any evidence to show that Cicero was deficient in physical or moral courage. The nearest instance that I have found is in his defence of Milo. Froude says that Cicero was "unnerved, his tongue forgot its office, and that he stammered, blundered, and sat down." This statement seemed to me remarkable. Cicero was an experienced orator. He had faced unfriendly audiences before. At the trial of Milo there was no element of personal danger to the advocate. Pompey, coming into the city with a body of troops, had taken command and restored order, and the court was occupied by soldiers.

Middleton, in his Life of Cicero, speaking of the trial of Milo, gives a different version of it, and says that when Cicero rose he was received with so rude a clamour by the Clodians that he was much discomposed and daunted at his first setting out, yet recovered spirit enough to go through his speech of three hours. Plutarch tells us: "As to Cicero his trembling was imputed rather to his anxiety for his friend than to any particular timidity."

The best estimate of a man's character is the esteem in which he is held by those who know him best. Cato praised Cicero for justice, clemency, and integrity. Balbus, who had been sent by Cæsar, and who spoke for Cæsar, said to Cicero: "Pompey and Cæsar have been divided by perfidious villains. I beseech you, Cicero, of your influence to bring them together again." The reflections of Cicero at this time do not suggest the flight of nearly 2,000 years. How modern sounds the question, "Should a man adhere at all risks to one party, though he considers them on the whole to have been a set of fools?" And, "May he not retire and live quietly with his family and leave the public affairs to their fate?"

The domestic life of philosophers like Socrates, statesmen like Pericles, soldiers like Cæsar, and orators like Mirabeau, is regarded by the world as negligible

when compared with great achievement. In the fierce glare of public life, the light of the hearthstone grows dim. Cicero appears to have been free from the vices of the times in which he lived, and while he divorced Terentia when she became old and ill-tempered, and married a younger and more attractive woman, Plutarch tells us "Terentia was by no means of a meek and timid disposition, but had her ambition, and (as Cicero himself says) took a greater share with him in politics than she permitted him to have in domestic business." It must be remembered, moreover, that the marriage tie was no longer regarded as sacred in Rome. There is much in the Roman Republic during the time of Cicero to remind us of existing conditions in this country,—the rise of the commune, the hostility between the poor and the rich, the corruption and vices of the aristocracy, the looseness of the marriage tie, the subversion of the Constitution.

It has been charged that Cicero was wanting in dignity, and this charge is founded on the violent, abusive, and gross invectives that he hurled at his political opponents. Just where the line is to be drawn in the use of language must depend on the time, place, and circumstance of its utterance, on the manners of the times, and the provocation received. The denunciations by Cicero of Metellus, Piso, and Galbinius are couched in language too foul to be repeated in this presence, and yet it should be remembered that Metellus had gone to Rome at the instance of Pompey to prepare the way and to secure for him the consulship. It was the custom for the retiring consuls to give an account of their stewardship. Metellus, who had become tribune, forbade Cicero to deliver his oration, and placed the order on the ground that a man who had put Roman citizens to death without a hearing had himself no right to be heard. The reference was to the execution by the Senate of the Catiline conspirators. Metellus proposed to impeach Cicero. It was natural that every passion in the heart of Cicero should have been roused. On the morning of the day when Cicero exposed the conspiracy, two of the conspirators, Marcius and Cethegus, had gone at dawn to his house for the purpose of murdering him in his bed. They had been refused admittance, and when, later in the day, the Senate assembled at the Temple of Jupiter Sartor, Cicero described the attempt on his life, and made the immortal speech that drove Catiline from the temple. The Senate, in sentencing to death Lentulus, Cethegus, and their fellows, had acted after full debate and in the exercise of a privilege claimed by the Senate, to suspend, in grave emergencies, the law which gave to a citizen the right to be heard before sentence should be pronounced. The exercise of this privilege by the Senate was resented by the populace, and Metullus, for the purpose of securing the support of the popular party for Pompey, was seeking to arouse the passions of the mob by forbidding Cicero to speak, and by threatening him with impeachment. Pompey was the idol of the people, his name was on every tongue, and Metullus was his personal representative and one of his most distinguished officers. While the language used by Cicero may be criticized as inelegant, even coarse and brutal, yet they were brave words, bravely spoken, at a time of great public danger, and under provocation that stirred the hot blood of the man and aroused the indignation of the patriot.

The denunciation by Cicero of Clodius, Gabinius, and Piso may have been undignified and the words used most vile, and yet Clodius was the omnipotent ruler of the Roman mob. Gabinius was the chief supporter of Pompey, and Piso was the father-in-law of Cæsar. Clodius had driven Cicero into exile; Gabinius and Piso as consuls had consented to it. How natural, then, it was that upon his return from exile he should have flayed the men who had been responsible for the great wrong done him. When we reflect upon the unbridled power and desperate character of Clodius, and upon the political eminence of Gabinius and Piso, especially upon the relations of the one to Pompey and of the other to Cæsar, the criticism of Macaulay that Cicero's whole soul was under the dominion of a craven fear is without authority to support it.

Cicero never sought the popularity of

the demagogue, or appealed to popular passions, or attempted to create a prejudice against the aristocracy. That Cicero was politically ambitious, that he never lost sight of his own consequence, and that he was not disposed to shine as a satellite, are undoubtedly true. To attain his political ends, he played politics. Thus in the contest between Cicero, Catiline, and Antonius for the consulship, Cicero promised his influence to secure a province for Antonius in consideration of the support of the latter, notwithstanding the fact that Antonius had been expelled from the Senate for general worthlessness. In ancient Rome, as in modern America, politics makes strange bedfellows.

Macaulay, it will be remembered, referred to Cicero as a trimmer, and Froude, having evidently in mind the language of Macaulay, says: "Cicero had thus reached the highest step in the scale of promotion by trimming between the rival factions." These factions were the popular and aristocratic parties. Cicero had denounced "the infamies and follies of senatorial favorites," and yet it was not "trimming" if when he found himself in the Senate, he reached the conclusion that a combination of the Equestrian and Patrician orders and a union with them of the great commoners, was wisest and best for the state. The democracy—the multitude—had made war on property. The agrarian laws had violated property rights. The masses of the poor who crowded into Rome were hostile to the prosperous and well-to-do citizens. Upon these debauched voters the popular party in large part depended. They were not only corrupt, but dangerous. The aggregation of voters in ancient Rome, and the passions that moved them, are strikingly suggestive of conditions in the great cities of this country. I can well understand how Cicero, after his election as consul, by the vote of the popular party, aided by the aristocratic party, could have given his full support to the conservative faction. Cicero was a member of the Equestrian party; he was not an aristocrat. He did not believe that good government could rest either upon the fickleness of the populace or on the vices of the aristocracy. He had one controlling, overmastering, and dominant political thought, and that was the preservation of the free institutions of Rome through a strict adherence to the Roman Constitution.

I read nowhere in history a more striking and splendid picture of courage, firmness, and devotion to duty than that which was presented by Cicero when Cæsar appealed to him to attend the Senate, saying that Cicero's influence would govern the other Senators. Pompey and Cæsar had become enemies. The former had gone to cover the Mediterranean with fleets, and more than half the Senate was with him. Cæsar by appointment had met Cicero on the road, and, urging him to return, Cicero inquired whether, if he returned, he might speak as he pleased; he said he could not consent to blame Pompey, and he should say that he disapproved of attacks upon him either in Greece or Spain. Cæsar replied that he could not permit language of that kind. Cicero in this parting from Cæsar gave utterance to a lofty sentiment when he said to Atticus: "I consider that it was more decent to forsake Cæsar in success than when beaten and in difficulties." Cæsar and Cicero went their respective ways. The way of the one led to the foot of Pompey's statute, the other to the blood-stained litter in the woods hard by the villa of Formiæ,—both lead to death.

A somewhat careful study of the life and character of Cicero leads me to the conclusion that while he was at times driven from his course by the fierce political storms that beat upon him, and by subterranean currents that were as dangerous as they were hidden, yet through it all the North star that guided him in his long tempestuous voyage was the Constitution of his country. It seems to me that he was sincere in his devotion. In one of his letters to Atticus he says: "I have put out all my strength in the hope of mending matters and healing our disorders." Again, in referring to Pompey, he writes: "I make no concessions to him, I seek to make him better and to cure him of his popular levity." Writing of Cæsar, he said: "What if I can make Cæsar better also, who is now coming on with wind and tide?" The in-

junction of Cicero "Increase thy fame and seek the praise of the good," and his words to his son Marcus: "No man lives for himself alone, a part of his life belongs to his country" portray his character. Large was his ambition, but its realization was to be found in the welfare and glory of the Republic.

The life of Cicero is a sad commentary on the fickleness of popular favor. Exiled on the motion of Clodius, who had become a tribune of the people, Cicero fled to Sicily. His property was confiscated, his houses razed, the site of his Roman palace dedicated to the Goddess of Liberty, and he forbidden to reside within 400 miles of Rome under penalty of death if he returned. After sixteen months he was recalled from exile, the Senate voted money to rebuild his palace and villas, and we find him back again in the Senate, hurling his invectives at Clodius.

Cicero was not an original thinker. He did not possess the strength and firmness of character sufficient to withstand the storm and stress of Rome's furious political wars. His weakness was in his vacillation. He has been severely assailed because of his defense of persons charged with crime and who were generally supposed to be guilty. He defended Vaternius to please Cæsar, and appeared for Gabinius to ingratiate himself with Pompey. He was at the voting place when Catiline was a candidate for consul, accompanied by a guard of men who could be depended on, and yet he defended Musena for bribery at this very election. When Catiline was charged with misgovernment in Africa, Cicero was his advocate, and nevertheless at a later period, with words as brave as ever fell from human lips, words blazing, burning and consuming, he drove Catiline from Rome.

Cicero was an advocate, and certain it is that under the rule of the English bar it was the duty of Cicero to stand between the state and the accused. An English writer, referring to this rule, declares that it has been "handed down to us by long generations of men who have left the reputation of the bar of England for integrity, fearlessness, and impartiality unrivalled in the world."

It is true that Cicero sought a commission from the Republic, and again courted Cæsar; that he resolved to follow Pompey and then determined to stand neuter; that he finally concluded to join Pompey, and after Pharsalia returned to Italy; that he was irresolute, inconsistent, wanting in self-confidence, and at times dejected; that he was never decided, but repented of every important step he had taken. And yet he could rise to splendid heights of speech and action. There are few finer instances of great firmness and large sense of justice than the refusal of Cicero to include the name of Cæsar in the list of those proscribed at the time of Catiline's conspiracy. Froude says of it: "Cicero was too honorable to lend himself to an accusation which he knew to be false."

We can tell something of the life of a man by the manner of his death, and when death came to Cicero he met it with Roman dignity. Proscribed, the soldiers of the Triumvirate sought him, and from his litter he extended his head to the sword. Strange indeed was that death, for the murderous blow was struck by Popilius, a client whom he had successfully defended. The hands of the great orator were cut off, and even the eloquent tongue was pierced with a needle by a vengeful woman; while the head carried to Rome was fastened up above the rostra. So perished Cicero the politician. But Cicero the lawyer and orator lives, and will live as an inspiration so long as a great profession admires and respects scholarship, learning, eloquence, and culture.

There was much in the political life of Cicero to admire, and few things are more admirable than his utterance when assigned as quæstor to Sicily, that "he received this office not as a gift, but as a trust."

Rome and its Constitution were to Cicero one and inseparable, and when he saved the Constitution he saved Rome. It was his proudest boast that he had saved his country.

I quote his words and commend them to you: "Would you have praise and honor, would you have the esteem of the wise and good, value the Constitution under which you live."

The Legal Bookworm

BY MARVIN LESLIE HAYWARD

of the Hartland (N. B.) Bar

THE eventide falls fast in Flanders where the great drama of the world is being played for the benefit of the neutral nations on a stage of blood, and the murky twilight dropped like a black pall over the trenches where the Canadian division, including the beloved "Princess Pats," stubbornly held the gates to Calais. The indescribable hum of battle rose like an incense to Mars, and several miles to the rear fifty sabres of flame stabbed the inky night, as the Victoria field artillery roared out their daily diapason of death.

A staff officer's automobile picked its way gingerly along the narrow road; the transport wagons and the ambulances passed and repassed with their burdens of life and death; and the voices of Weldon's Engineers, or the "Monquat Rangers," as they were commonly called, rolled back from the first line trenches to the improvised dugout where Blaine and Arthur Broderick, as the latter said, "lived the life of angleworms and would die the death of rats."

"Listen," exclaimed Blaine. "Don't that sound like a gang of New Brunswick stream drivers coming out of Green River?"

The Rangers were singing their official marching song, and the doggerel chorus rang out lustily between the roars of the big guns.

"And Weldon he says,
'Get out of the path,
Of the bullies of Bristol,
And the sluggers from Bath.'"

Blaine smoked away impassively, but Broderick twisted nervously, and broke into profane and complaining speech.

"Don't know what they got to sing about," he argued, "with the mud and grub the way it's been for the last month."

"They have as much to live for as any of us," replied Blaine, "and life is sweet even on the firing line."

Broderick dug fiercely at a mud laden puttee, and cursed after the manner of the English in Flanders in the time of the great and original Churchill.

"That's not saying much as far as I'm concerned," he demurred. I suppose I've about as little to look ahead to as any man in the whole Canadian division."

Blaine placed his pipe on the bench beside him, and gazed at his brother lieutenant in frank surprise.

"Why, you've got a good position, back home, with excellent prospects, and I always fancied Elsie cared for you," he exclaimed impulsively.

It was Broderick's turn to look bewildered.

"How did you know I loved her?" he demanded.

"When one is in love himself he is pretty keen on noticing such things," was the calm reply.

"'In love himself,'" repeated Broderick, a wave of understanding lighting up his gloomy countenance.

"Pardon me, old top, I didn't know we were rivals. But it won't make any difference with our friendship, and we may not be rivals long."

And both men fell to industriously filling their empty pipes, and an embarrassed silence filled in the intervals of the "Rangers" song.

"I don't suppose there's any more chance of getting the mail this week than there is of the war closing 1920," declared Broderick, shifting the discussion into the one subject of perennial interest as the safest outlet.

Blaine did not have time to follow the convenient lead. Sergeant Sipprell pushed his broad shoulders through the narrow door and flung a batch of Canadian mail on the rickety table.

"The 'Munster Rifles' gave the 'Boches' h— up at Hill 77 last night," he announced.

The tenants of the dugout disregarded this official bulletin, made a dash for the packet of mail as if it were a German trench, sorted out their own letters, and tore them open with trembling fingers.

Blaine read the opening lines of the first letter which he selected, and his bronzed face grew rigid.

"No, my dear friend," he read, "I cannot answer your question in the way you would like, and it is unfair not to tell you. Not that I don't admire you very much, but I could never marry you,—never.

"I could really care for you more than I am willing to admit if I would let myself; but I am afraid—and because I am afraid I will not permit myself to wreck both our lives. And my reason for feeling that way about it will probably appeal to you as a fanciful one; but to me it is very real and tangible.

"It is simply this,—that you are so absorbed in your profession and so taken up with your work that in time I would become a mere secondary consideration. Don't shake your head and say 'nonsense,' for I know, my dear friend. While other wives might fear the power of the gaming table or the saloon, my rivals are the law books that are even now the 'better half' of your life, and whose loss you are no doubt mourning right now."

Blaine stopped reading, and recalled with a little shudder how that very afternoon when a "whiz bang" had burst in front of the dugout, it had roused him from a mental discussion of a very interesting point on the law of "automobiles," coupled with the tantalizing knowledge that the volume of "Ruling Case Law" which would settle the point was back on the second right-hand shelf of his Rockport office, now "closed during the war."

"You will remember," he read on, "how you couldn't even go away for a week end without the latest copies of "Case and Comment" and the "Canadian Law Notes," and you no doubt recall the time of the picnic at Carter's grove, when we found a volume of "British Ruling Cases" hidden in the lunch basket. I am sure that giving up your legal work to enlist was the greatest sacrifice of all. No, my friend.—"

He crushed the letter in his brawny hand, and glanced furtively across at Broderick, who was eagerly poring over a legal looking document with a familiar red seal "set like a sun in the margin."

And notwithstanding the disappointment which had just come to him with such crushing and unexpected force, he found himself longing to finger this tangible reminder of his profession, and hoping that Broderick would discuss its contents with him.

"Don't that beat h— and Louvain!" exclaimed Broderick.

"What's doing?"

"You remember me getting the cable the first of last month that Uncle Bill was dead. Well, here's a certified copy of his will," explained Broderick, slapping the document on the little table.

"Did he remember you therein?"

"Oh, he remembered me with a vengeance. He had never married, and I was his nearest relative, and a great favorite of his. Always said he was going to leave me his property when he died. He had made his money in the States, though—"

"Yes, I remember. 'Anaconda Bill' the boys always called him," interrupted Blaine.

"And he was rather down on the Allies in this war," Broderick went on, "and was almost a German sympathizer.

"But surely that wouldn't make any difference with his will."

"It did, though, and he's cut me off without even the proverbial shilling, or dollar, I think it is in New Brunswick. Read it."

Blaine snatched up the document eagerly, and glanced over it with a practised eye.

"Short, sweet, and to the point," he remarked pleasantly.

"Everything else but sweet to me," grumbled Broderick. "But read it out and give me the full benefit of knowing how it feels to lose a cool hundred thousand dollars."

" 'Whereas,' " read Blaine, " 'my nephew Arthur Broderick has seen fit to enlist with the Canadian troops for Over-

seas service, I hereby will and declare that the said Broderick shall not under any circumstances take any part or any share of my estate.'"

"That's all, and it's properly signed and witnessed," concluded Blaine.

"Enough, too," declared Broderick gloomily.

"I think you said you were your uncle's heir, so that the property would have gone to you if there had been no will?" queried Blaine eagerly.

"Yes, but that does me no good when there is a will."

"Your good uncle has merely given another striking illustration of the established rule that the jolly testator who makes his own will is after all the lawyer's best friend," declared Blaine.

Blaine leaned forward with an alert look of professional zeal on his face, and tapped the will lovingly.

"'Anconda Bill' has stumbled on one of the most interesting legal points imaginable," he declared with marked enthusiasm.

"It is an established legal principle," Blaine went on didactically, "that any man may dispose of his property by will to any person he wishes, and may utterly disinherit his heir if he so desires."

"I've just learned that by bitter experience," interrupted Broderick.

"But," continued Blaine eagerly, "it is equally well established that an intention that the heir will not take, although expressed in the most positive terms, is not sufficient to disinherit the heir unless there is a gift over to somebody else. It is not enough for the testator to say, 'I intend for my heir to take no part of my estate,' but he must go on and say whom he intends to have it. If he don't, the heir takes notwithstanding the will. There's a set of books back in my office now with some beautiful annotations on that very point."[1]

"Then you mean—"

"That this will isn't worth the 'blind' typewriter it was written on," declared Blaine, "and you take the estate as your uncle's heir just as if there never had been a will."[2]

"And the money is actually mine?"

"As much as that pipe you are smoking."

"Then I'm in a position to—" burst out Broderick, but instantly checked himself.

"Yes," winced Blaine, "you are in a financial position to ask Elsie to marry you if you wish."

Broderick was relieved from the embarrassing necessity of a reply. A mud-festooned corporal rushed in and summoned him to the front trench, where the usual nightly attack of the Saxon troops was assuming unusual proportions.

Blaine rose wearily and unfolded the crumpled letter.

"I guess Elsie's right," he muttered, and I'm too much of a bookworm to be a marrying man. Well, I hope she and Broderick will be happy, and he threw the letter into the little "Yukon" stove.

"I wonder," he mused dreamily, "whether that thin paper edition of L.R.A. is any improvement on the old style."

M. L. Haynes

[1] Referring no doubt to L.R.A., in view of the expressions in Elsie's letter and the citations in the following footnote.

[2] In the leading case on the point,—Coffman v. Heatnole, 2 L.R.A. 848, the court said: "It is a maxim that a testator can disinherit his heirs and next of kin only by leaving his property to others. Mere words of exclusion will not suffice; the estate must be actually given to somebody else. Though the intention to disinherit the heir be ever so apparent, said Lord Mansfield, in Denn v. Gaskin, Cowp. pt. 2, p. 657, he must of course inherit unless the estate is given to somebody else. So, in his celebrated argument in Ackroyd v. Smithson, 1 Bro. Ch. 503, 1 Am. Lead. Cas. (Hare & W.) 690, 3 P. Wms. 22, note, 7 Eng. Rul. Cas. 8, Mr. Scott (afterwards Lord Eldon) said that the proposition that the heir at law is entitled to every interest in land not disposed of by his ancestor is so much of a truism that it calls for no reasoning to support it. It is not enough, he said, that the testator did not intend his heir to take; he must make a disposition to somebody else, otherwise the heir will take even against his intention, however plainly manifested. And the reason is, that the law provides how a man's estate at his death shall go, unless he by his will plainly directs that it shall be disposed of differently."

See also Bradford v. Leake, Ann. Cas. 1912D, 1140, and cases cited therein, and 40 Cyc. 412, note (18).

Editorial Comment

But since he had
The genius to be loved, why let him have
The justice to be honoured in his grave.—Mrs. Browning.

Case and Comment

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Defaming the Memory of Great Men

A RESIDENT of the state of Washington was so imprudent as to refer to the first President, in a letter to a newspaper, as an exploiter of slaves and addicted to the use of profanity and liquor. He has been convicted by a jury of "libeling the memory of George Washington," and is said to be subject to fine and imprisonment under the state statute.

With the facts of this case we need not concern ourselves. The broad subject of liability for defaming the memory of a noted person is, however, one of interest in a critical age with scant reverence for the past.

While it is true that scorn and ridicule cannot penetrate the tomb, and that the illustrious dead rest secure in the glory of their achievements, still it has long been considered at common law that any writing put forth to blacken the memory of one deceased is a libel, and this for the reason that "although the private man or magistrate be dead at the time of the making of the libel, yet it is punishable; for in the one case it stirs up others of the same family, blood, or society to revenge, and to break the peace, and in the other the libeler traduces and slanders the state and government, which dies not." Such is the doctrine of the Case de Libellis Famosis, reported in 5 Coke, 125a, and decided in the third year of the reign of James I. "This principle, however," it is said by Mr. Newell in his work on Slander and Libel, "is never carried so far as to trespass on the utility of history and the salutary freedom of the press. The law will always take into consideration the mind with which such publications are made, and discriminate between the historian and the slanderer." Lord Kenyon clearly stated the rule in Rex v. Topham, 4 T. R. 126, where he observed: "To say, in general, that the conduct of a dead person can at no time be canvassed, to hold that even after ages are passed the conduct of bad men cannot be contrasted with good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with malevolent pur-

pose to vilify the memory of the deceased and with a view to injure his posterity, then it comes within the rule,—then it is done with a design to break the peace, and then it becomes illegal."

Dishonest Advertising By Mail

THE Supreme Court of the United States in the recent case of United States v. New South Farm & Home Co. 241 U. S. 64, 60 L. ed. —, 36 Sup. Ct. Rep. 505, made an important decision as to what constitutes dishonest advertising through the mails. The district court of the United States for the southern district of Florida sustained a demurrer to an indictment charging defendants with using the mails to defraud by transmitting through the postoffice false representations as to tracts of land which they offered for sale. The lower court held that if a purchaser received his money's worth, exaggerated propaganda was not fraud. But Justice McKenna, who delivered the opinion of the Supreme Court, held that persons employing, in furtherance of a plan to sell 10-acre farms, false representations as to climate, fertility, crops, advantages, prospective improvements, etc., have engaged in a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," within the meaning of the Federal Criminal Code, § 215, making criminal the use of the mails in the execution of such scheme, although the lands to be sold may be worth as much as the purchase price asked.

In discussing what constitutes a criminal offense under the statute governing the use of the mails, Justice McKenna said: "Mere 'puffing' might not be within its meaning (of this, however, no opinion need be expressed); that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has, but invents advantages and falsely asserts their existence, he transcends the limit of 'puffing,' and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented, and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces. Harris v. Rosenberger (C. C. A. 8th C.) 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449; O'Hara v. United States (C. C. A. 6th C.) 64 C. C. A. 81, 129 Fed. 551, 555; Colburn v. United States (C. C. A. 8th C.) 139 C. C. A. 136, 223 Fed. 590; Wilson v. United States (C. C. A. 2d C.) 111 C. C. A. 231, 190 Fed. 427. See also United States v. Barnow, 239 U. S. 74, 60 L. ed. —, 36 Sup. Ct. Rep. 19. Especially is this true in the purchase of small tracts for homes, and upon this, if the allegations of the indictment are true, the defendants touched every string of desire by false statements, and sounded every note that could excite and delude."

It is evident that this decision will make possible the enforcement of a much more stringent Federal supervision of mail advertising.

Peace at Any Price

A REMARKABLE statement opposing a "peace at any price" policy for the United States, and openly advocating the extension of democracy in Europe, as the only goal and guaranty of permanent world-peace, has been issued. The statement is noteworthy for the range of its signatures.

Labor organizers, churchmen, social reform workers, publicists, authors, socialists, suffragists, settlement workers, and public officials are represented.

Henry Ford's statement that "not one per cent of the American people want war" is conceded to be true, but coupled with the concession is the counterclaim that "not one per cent want peace at any price." This is declared to be the opinion even of well informed pacifist authors, such as Hamilton Holt of the Independent, and G. Lowes Dickinson.

The statement further points out that

thirteen of the twenty-two peace programmes of the world, issued by Henry Ford's Stockholm Bureau, emphasize the need of military power to enforce international law, among them the Women's Peace Party, the British Fabian Society, of which Bernard Shaw is the leading spirit, the International Peace Bureau, and the Scandinavian Peace Conference, as well as the League to Enforce Peace, whose Washington programme from first to last recognizes military power as a necessity of intranational and international order. The statement therefore summons America to take the steps necessary to play its part in enforcing international justice, as well as for self-defense, and concludes with the recommendation of an alliance between America and all other democratic and peacefully inclined nations for international action.

Industrial Deaths Reduced

THE Industrial Accident Commission has issued figures giving the number of deaths in the industries of California during the year 1915, and draws attention to the list as compared with the statistics for 1914. In the latter year there were 691 workers killed, and in 1915, 533 workers gave their lives to the industries of this state. The following table shows the reductions in the death list by occupations (the word "Service" includes employees of men in the professions, as well as those engaged in hotel service, apartment houses, restaurants, domestic servants and amusement or entertainment employees):

	1915	1914
Agriculture	55	62
Construction	78	115
Extraction (Mining and Quarrying)	71	86
Manufacturing	99	121
Service	25	24
Trades	20	24
Transportation and Public Utilities	172	239
Unknown	13	20
Total	533	691

The effective work in behalf of "Safety First" has been accomplished as a result of cordial support from employers and employees, the public generally, and the press of California. It is a striking result to be able to show a reduction of 158 in the death roll of 1915 as compared to 1914. That this reduction comes as the result of careful planning is shown by the decrease in the main industries of the state, excepting service, where the record shows an increase of one death in 1915 over 1914.

It is the hope of the Industrial Accident Commission that statistics will show a substantial reduction for each succeeding year. The aim is that no preventable death shall take place. The 158 lives speak in terms of breadwinners saved to wives and little children and an enrichment to the state's citizenship.

National Highways Commission

RESOLUTIONS urging Congress to create a national highways commission to investigate and report upon the most economic and beneficial method for the Federal government to participate in the building of good roads are being submitted by the National Highways Association to state legislatures, chambers of commerce, and civic organizations in all sections of the country.

Believing that Congress is now practically committed in principle to the policy of Federal participation in good roads construction, this movement has been undertaken to direct such participation along the most scientific and economic lines. The form of resolution offered to the legislatures and chambers of commerce provides that the National Highways Commission shall survey and locate a system of highways connecting all state highway systems by interstate trunk lines, thus providing a national system of highways which will correlate the state systems just as the state systems in thirty-one states of the union now correlate and bring to their highest value the county and township systems.

With every "good roads" measure that is introduced in Congress it is made evident that the trend is away from "pork" and toward a method of Federal participation which will secure the most efficient administration of the work and the most economic results.

Among the New Decisions

No law can possibly meet the convenience of every one: we must be satisfied if it be beneficial on the whole and to the majority.—Livy.

Animals — dog in duplex flat — injury — sufficiency of evidence. That one may be found negligent in keeping a vicious, unfastened dog in a duplex flat having a common vestibule from which doors lead into the separate apartments under such circumstances that his door may be opened by mistake by a visitor to the other apartment, so that the owner should have anticipated that injury might occur unless the dog was kept secured, is held in Harris v. Hoyt, 161 Wis. 498, 154 N. W. 842, which is accompanied in L.R.A.1916C, 344, by a note as to liability for injury inflicted by a dog upon one who enters premises by mistake.

Bank — agreement to pay check — right of holder. Where a national bank, through its president, agrees with a customer, who is indebted to it, that if he purchases live stock, and in payment therefor gives checks on the bank, the checks will be paid, provided that by the time they are presented the drawer shall have resold the stock and deposited the proceeds with the bank, and in pursuance of such agreement the customer issues checks in payment for stock which he at once resells, delivering the proceeds to the bank, the holder of such checks, it is held in Ballard v. Home Nat. Bank, 91 Kan. 91, 136 Pac. 935, can maintain an action for their amount against the bank, notwithstanding he did not know of the agreement, and notwithstanding nothing was said, at the time the deposit was made, about the agreement or the application of the funds.

The right of the holder of a check to maintain an action thereon against the bank is treated in the note accompanying the foregoing decision in L.R.A.1916C, 164.

Bank — collection — conversion — lien. The conversion and dissipation by a bank of the proceeds of paper sent it for collection, is held in Macy v. Roedenbeck, 227 Fed. 346, give the owner of the paper no lien on the general assets superior to that of general creditors in case the bank becomes insolvent, but such claim may have priority with respect to cash remaining in the bank when it closes its doors.

This decision is accompanied in L.R.A. 1916C, 12, by an extensive note on identifying misapplied trust funds to follow and recover them.

Carrier — negligence of subsidiary company — liability. One railroad company, it is held in the Oklahoma case of St. Louis & S. F. R. Co. v. Sanford, 153 Pac. 650, L.R.A.1916C, 400, does not become liable for the negligence of another merely by reason of being a stockholder in the corporation guilty of the negligent act, but where one company

actually controls another, and operates its line of road as a single system, and sells tickets at the stations of the subordinate line over its system, the dominant company will be liable for injuries suffered by a passenger due to the negligence of the subordinate, although the subordinate company keeps up its corporate organization.

This decision is in accord with the rule sustained by the earlier cases which are collected in a note in 35 L.R.A.(N.S.) 770.

Carrier — overcharge — action to recover. Upon dissolution of an injunction restraining the putting in force by the state of a schedule of rates lower than those charged by the carrier, the state cannot, it is held in State ex rel. Barker v. Chicago & A. R. Co. 265 Mo. 646, 178 S. W. 129, annotated in L.R.A. 1916C, 309, maintain an action to recover on behalf of passengers and shippers the excess rates and fares exacted from them by the railroad during the existence of the injunction; but shippers and passengers, whether individuals or the state, may maintain actions for such purpose.

Carriers — trespassers — right to recover. That a child injured in attempting to catch a ride on a street car can hold the company liable for the injury only in case it was caused by wantonness, wilfulness, or recklessness on the part of the company, is held in Elie v. Lewiston, A. & W. Street R. Co. 112 Me. 178, 91 Atl. 786, annotated in L.R.A. 1916C, 104.

Carrier — unwarranted arrest. While a carrier is not liable in damages for the failure of its agents to prevent an arrest and removal of a passenger from its train by an officer of the law acting under proper authority, yet it is held in the West Virginia case of Anania v. Norfolk & W. R. Co. 87 S. E. 167, L.R.A.1916C, 439, if such agent knows, or in the exercise of reasonable diligence could have known, the arrest was unwarranted and unjustifiable or without sufficient foundation or cause, and fails to protest, or, without the use of force, to prevent such arrest, the carrier is liable, and must respond in damages to the person so unlawfully arrested and removed from its train.

Check — certification — effect on right to set-off against payee. The certification of a check sent by a collecting bank to its correspondent, which is in fact insolvent, to transmit funds collected for it, is held in Carnegie Trust Co. v. First Nat. Bank, 213 N. Y. 301, 107 N. E. 693, L.R.A.1916C, 186, to cut off the right of the collector to set off such check against its deposits in the insolvent bank, and the drawer cannot therefore stop payment of the check although it had no notice of the insolvency until after the certification.

Commerce — state regulation — transporting intoxicating liquors — Webb-Kenyon act. Shipments into a state of intoxicating liquors, which, because intended solely for the personal use of the consignees, were not to be used in violation of the laws of the state as construed by its highest court, are not subjected, it is held in Adams Exp. Co. v. Com. 238 U. S. 190, 59 L. ed. 1267, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167, L.R.A.1916C, 273, to the operation of a law of such state forbidding carriers to bring intoxicating liquors into, or deliver them in, any dry territory, by the provisions of the Webb-Kenyon act prohibiting the interstate shipment or transportation of intoxicating liquors which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state into which the liquor is transported.

Commerce — validity of Webb-Kenyon law — delegation of authority to state. The Webb-Kenyon law is held not invalid in the Alabama case of Southern Exp. Co. v. Whittle, 69 So. 652, L.R.A.1916C, 278, as an attempt by Congress to delegate to a state its power over interstate commerce, although interpreted to permit the state to prescribe the manner or method by which, or the quantity or time in which, intoxicating liquors may be received and possessed in that

state, so as to permit some importations of such liquors and prohibit others.

Constitutional law — impairment of contract — rate regulation. That a contract between a municipality and a water company fixing rates to private consumers does not prevent a Board of Public Utility Commissioners from fixing a higher rate, as against the objection of the municipality and consumers, is held in the New Jersey case of North Wildwood v. Public Utility Comrs. P.U.R. 1916B, 77, since the state, through the agency of the Board, may waive the contract rights of the public without improperly impairing the obligation of the contract.

Corporation — stockholders as partners. That a creditor who has dealt with a corporation de facto in its corporate name and capacity, and given credit to it, and not to its stockholders, cannot, in the absence of fraud, charge them as partners with the debts of the corporation, is held in Swofford Bros. Dry Goods Co. v. Owen, 37 Okla. 616, 133 Pac. 193, annotated in L.R.A.1916C, 189.

Counterclaim — tort — in contract action. The loss occasioned to the purchaser of a machine through negligent injury to his minor child while it is assisting the vendor to repair the machine, as the contract of sale requires in case the machine fails to operate, is held in Advance Thresher Co. v. Klein, 28 S. D. 177, 133 N. W. 51, L.R.A.1916C, 514, to be connected with the subject-matter of an action on the purchase money notes, within the meaning of a statute permitting such matters to be set up by way of counterclaim, and therefore is a proper counterclaim in such action although it is founded on tort.

Discrimination — water — free service for private fire protection. That a water utility should receive compensation for service rendered to persons who make sprinkler or other connections for private fire protection is held in the Indiana case of Commercial Club v. Terre Haute Waterworks Co. P.U.R.1916B, 180.

Evidence — declarations — victim of abortion. Declarations made by the woman during the time she was under treatment and before the final act of abortion was committed, to the effect that defendant was her physician, had treated her for the purpose of bringing about a miscarriage, and was to administer to her further treatment for that purpose, are held properly admitted in evidence as a part of the res gestæ, in the Minnesota case of State v. Hunter, 154 N. W. 1083, which is accompanied in L.R.A. 1916C, 566, by a note on admissibility of declarations of one upon whom an abortion is committed against others charged with complicity therein.

False imprisonment — defense — information. In an action for false arrest and imprisonment it is held in the Minnesota case of Witte v. Haben, 154 N. W. 662, annotated in L.R.A.1916C, 228, not a justification that the defendant as a police officer made the arrest upon reliable information that the plaintiff was insane, that the officer in good faith believed this to be true, and that an ordinarily prudent person, under the same conditions, would have entertained and acted upon such belief, the arrest being made without warrant, and there being no proof of insanity, nor any urgent necessity for restraint, even had plaintiff been in fact insane.

Game — domestication — possession — closed season. That the legislature cannot make illegal the possession of game such as deer and wild fowl which had been reduced to possession and was cared for as though domesticated at the time of the passage of the act, where the Constitution forbids the taking of property without due process of law, is held in the case of Graves v. Dunlap, 87 Wash. 648, 152 Pac. 532, annotated in L.R.A. 1916C, 338, which further holds that a statute making it unlawful at a specified season of the year to hunt, pursue, take, kill, injure, or destroy any deer does not prevent the establishment of a herd of deer taken at other seasons of the year for the purpose of confining and caring for them as though domesticated.

This case further determines that the

owner of a herd of domesticated deer may, during the closed season, kill such as shall have been wounded or crippled, or such as are necessary in the care and management of the herd.

Also that one maintaining a flock of domesticated game birds cannot be given power by the court to dispose of them in such manner as he sees fit, since that would permit them to be killed and disposed of during the closed season, and thereby interfere with the enforcement of the game laws.

Highway — breaking of guard rail — liability of municipality. A municipal corporation is held not liable for an injury caused by the breaking of a railing erected along a highway embankment, when a person of more than ordinary weight attempts to use it as a seat, in District of Columbia v. Washington, — App. D. C. —, annotated in L.R.A. 1916C, 379.

Highway — change of grade — abolishing grade crossing — interference with access — liability. The rule of nonliability on the part of a municipality for mere interference with access to abutting property by change of a street grade is held to apply in Baltimore & O. R. Co. v. Kane, 124 Md. 231, 92 Atl. 532, L.R.A.1916C, 433, even in case the change is made to abolish a grade crossing of a railroad track and the railroad company is greatly benefited by the improvement.

Highway — liability of railroad company. A railroad company is held not liable in Baltimore & O. R. Co. v. Kane, supra, for injury to the access of an abutting owner by the change of the grade of a street to abolish a grade crossing of its tracks, although it is greatly benefited by the improvement, if the work was done by the municipality.

This case further holds that a railroad company which voluntarily accepts municipal authority to change the grade of a highway to abolish a grade crossing of its tracks, and does the work necessary to effect such change for its own interest, is liable for injury inflicted upon an abutting property owner by the obstruction of the access to his property, from the street, although the interest of the public is also subserved by the improvement.

Husband and wife — estoppel of wife. A married woman is held to be under no disability by reason of coverture, in Brusha v. Board of Education, 41 Okla. 595, 139 Pac. 298, and is subject to the same rule of estoppel as any other person sui juris.

The applicability of the doctrine of equitable estoppel to married women, independently of contract, is treated in the note accompanying the foregoing case in L.R.A.1916C, 233.

Husband and wife — marriage of woman after injury — effect. The marriage of a woman after injuries negligently inflicted by a carrier in the operation of its trains is held not to affect her right to recover damages for the loss of time and capacity to earn money, due to such injuries, in the West Virginia case of Booth v. Baltimore & O. R. Co. 87 S. E. 84, annotated in L.R.A.1916C, 589.

Injunction — against arrest on criminal process. Injunction lies, it is held in Alexander v. Elkins, 132 Tenn. 663, 179 S. W. 310, L.R.A.1916C, 261, to prevent the repeated use by connivance of a justice of the peace and the wife's father, of warrants of arrest purporting to be based on a statute which has been declared unconstitutional, but which was enacted to compel men to furnish support for their wives.

Injunction — against blacklisting. That an injunction lies against a combination to blacklist striking employees so as to prevent their securing contracts with other employers is held in Cornellier v. Haverhill Shoe Mfrs. Asso. 221 Mass. 554, 109 N. E. 643, which further determines that a striking employee who participates in the unlawful acts of the labor organization to which he belongs, in furtherance of the strike, will not be granted an injunction against being blacklisted by the employers in his locality and trade.

Supplemental annotation on the sub-

ject of blacklisting employees accompanies this decision in L.R.A.1916C, 218.

Intoxicating liquors — Webb-Kenyon act — preventing shipment of liquors into state. The Webb-Kenyon act, extending the power of states to prohibit the transportation of intoxicating liquor into their territory, is held to apply to state legislation enacted before its passage, in West Virginia v. Adams Exp. Co. 135 C. C. A. 464, 219 Fed. 794, L.R.A. 1916C, 291, which further holds that a state may, in view of the Webb-Kenyon act, prohibiting the transportation of intoxicating liquor from one state to another which is intended to be received, possessed, sold, or used in violation of any law of the latter state, prohibit the sale of intoxicating liquors within its limits, and provide that sales in which the delivery is to be made by a carrier shall be deemed to be made in the county where they are to be delivered, so as to be entitled to enjoin the carrier from making deliveries in violation of its statute, although the liquors are shipped from another state.

Larceny — appropriating check too large in amount. One is held not guilty of theft of a check, who, having received it honestly in payment for produce, cashes it and appropriates its proceeds after receiving notice that by mistake it was too large, in Mitchell v. State, — Tex. Crim. Rep. —, 180 S. W. 115, L.R.A.1916C, 580.

Monopoly and competition — telephones — invasion of occupied territory — location of towns and identity of interests. A telephone company was permitted to furnish service in a town already served, without complaint, in the Maine case of Re Franklin Farmers' Co-op. Teleph. Co. P.U.R.1916B, 66, where the town was entirely surrounded by other towns whose residents use the system of the applicant and where the town was a part of the allied communities whose interests were identical.

Municipal corporation — absolute liability for injury to workmen — power of legislature to impose. A municipal corporation having constitutional power to form its own charter and pass all laws and ordinances relating to municipal concerns, subject to the Constitution and general laws of the state, and to establish and maintain public grounds and utilities, is held not so exempt from the authority of the legislature in the Michigan case of Wood v. Detroit, 155 N. W. 592, L.R.A.1916C, 388, that its imposition upon it of absolute liability for injuries to workmen, while giving other corporations the option to refuse to come under the operation of the act, deprives it of its property without due process of law.

The question whether the legislature may impose the provisions of such an act upon a municipal corporation, without giving it the option extended to other corporations and to individual employers not to come under the act, seems to be one of first impression. The decision of the Michigan supreme court upholding the power of the legislature in this respect is especially significant in view of the fact that the Michigan courts have gone farther than those of most other states in protecting municipal corporations against interference by the legislature in their private as distinguished from their public functions.

Municipal corporation — power to remove awning posts. Power to require the removal of posts supporting awnings over a sidewalk is held conferred upon a municipal corporation in Etchison v. Frederick, 123 Md. 283, 91 Atl. 161, annotated in L.R.A.1916C, 561, by statutory authority to regulate the use of sidewalks for the use of awning posts, etc., and to compel the removal of any post in any sidewalk or highway.

Municipal corporation — power to utilize by-product of heating plant. That a municipal corporation having statutory authority to maintain a plant for the supplying of electric light and power may lay conduits to enable it to supply, for compensation at a profit, surplus steam to heat the houses of its inhabitants, is held in the Montana case of Milligan v. Miles City, 153 Pac. 276, L.R.A.1916C, 395.

Ne exeat — to prevent removal of notes from state. A writ of ne exeat, it is held in Caughron v. Stinespring, 132 Tenn. 636, 179 S. W. 152, annotated in L.R.A.1916C, 403, may be issued to prevent a nonresident who, without property in the state, has come into it to collect notes due for real estate sold by the acre, the amount of which was overstated by him, so that the purchaser is entitled to a rebate, from departing with the remaining notes from the jurisdiction of the court, so as to prevent the enforcement of the set-off against them.

Parties — injunction against waste of city funds — suit by taxpayer. A citizen and taxpayer of a city, although he does not use light and heat from its power plant, is held entitled, in the Montana case of Milligan v. Miles City, supra, to maintain an action to enjoin the wrongful expenditure of revenue from that plant to lay mains to heat private residences with surplus steam from it.

Principal and agent — authority to warrant automobile tires. That an agent for the sale of motor trucks has no power to bind his principal by a warranty that the tires will give a certain mileage under a load exceeding the rated capacity of the truck is held in Nixon Min. Drill Co. v. Burk, 132 Tenn. 481, 178 S. W. 1116, annotated in L.R.A.1916C, 411.

Principal and agent — power to execute note — compliance. Power to execute a note for a certain amount to a certain person, bearing a specified rate of interest, and due on or before a year from date, is held in United States Nat. Bank v. Herron, 73 Or. 391, 144 Pac. 661, not to authorize the execution of notes which aggregate the amount specified, with interest semiannually, the whole debt to become due at the option of the holder on default of an interest payment, with a provision for attorneys' fees in case of suit.

A note as to terms within the special authority of an agent to give paper for a loan is appended to the foregoing decision in L.R.A.1916C, 125.

Principal and agent — power to pay tax — authority to borrow money. Power conferred upon an agent to manage real estate, execute deeds and mortgages and the necessary promissory notes, and pay taxes, and generally to act as fully as the principal might do personally, is held in Williams v. Dugan, 217 Mass. 526, 105 N. E. 615, not to include authority to borrow money on the credit of the principal with which to pay the taxes.

The authority of an agent to borrow money for his principal is treated in the note accompanying this decision in L.R.A.1916C, 110.

Rates — several localities served by one utility — segregation — discrimination — natural advantages. That separate rates may be fixed for different communities served by an electric utility either through the same or different systems, giving a lower rate to localities enjoying natural advantages by reason of population or location, is held in the Washington case of Public Service Commission v. Pacific Power & Light Co. P.U.R.1916B, 86.

Receiver — acting without authority — right to repudiate contract. That one selling equipment to a receiver of a railroad company acting without authority cannot, upon the legal appointment of a receiver for the property, repudiate the contract for invalidity, is held in the Washington case of Crawford v. Gordon, 153 Pac. 363, L.R.A.1916C, 516.

Receiver — keeping equipment purchased without authority — liability. Receivers who upon taking possession of a railroad find there cars purchased by persons who assumed to act as receivers without authority, leaving the title in the vendors to secure the purchase price, cannot retain them, it is held in the Washington case of Crawford v. Gordon, supra, without paying the contract price if it has not been paid; and they cannot acquire the title merely by paying what the property is worth.

Release — of note — consideration. That a new undertaking to pay interest

on a note after maturity so long as the payee shall live is sufficient consideration to support an agreement to release the principal of the note, although the payee's normal expectation of life is only three years, is held in the Iowa case of Diehl v. McKinnon, 155 N. W. 259, annotated in L.R.A.1916C, 384.

Return — excessiveness of, in one department and deficiency in another. That a utility will not be permitted to enjoy an excessive return in its electric light and water departments to cover a deficiency in the return of its railway department is held in the Washington case of Public Service Commission ex rel. Everett Trades Council v. Puget Sound International R. & Power Co. P.U.R. 1916B, 81.

Return — water — power of commission — effect of general incorporation statute. That the general incorporation statute providing that municipalities may regulate rates for water except that rates should not be so low as to prevent the utility from realizing a net return of 10 per cent does not prevent the Indiana Commission from fixing rates that will produce a return less than 10 per cent is held in Commercial Club v. Terre Haute Waterworks Co. P.U.R.1916B, 180.

Sale — conditions — retaking property — resale — conversion. Where a vendor is not allowed to retain title to secure the purchase money, but the transaction is regarded as a sale with mortgage back, a vendor who, in accordance with the terms of his contract, repossesses himself of the property upon the buyer's default, is held guilty of conversion in Montenegro-Riehm Music Co. v. Beuris, 160 Ky. 557, 169 S. W. 986, if he sells it to a stranger without authority from or notice to the buyer, and will be compelled to account to the buyer for its value less the amount unpaid on the purchase price.

The right and duty of a seller who retakes the property under a right reserved in the contract, where the reservation of title is invalid, is treated in the note appended to the foregoing case in L.R.A. 1916C, 557.

Security issues — commission powers — out of state bonds. That the Arizona statute (¶ 2327 (a), chapter XI. Rev. Stat. 1913) providing that no corporation shall encumber the whole or any part of its railroad without the consent of the Commission cannot be held inapplicable to bonds to reimburse a railroad company for expenditures in acquiring Oregon property is held in the Arizona case of Re Southern P. Co. P.U.R. 1916B, 8, although the bonds are not to be issued in Arizona or to be payable there, and are not to be secured by any lien on the company's Arizona property, where it does not appear whether, in the event of a foreclosure, a deficiency judgment might not be taken against other property, or what relation the bond issue bears to the whole property of the railroad.

Service — meters — liability of consumer for injury to. A rule making the consumer liable for an injury to the meter is held unreasonable in the Indiana case of Commercial Club v. Terre Haute Waterworks Co. P.U.R.1916B, 180, in so far as it imposes a liability for injury not due to his lack of ordinary care.

Service — steam heat — operation at loss — discontinuance of service. That a steam-heating utility cannot discontinue service although it is operated at a loss is held in the Illinois case of Pana v. Central Illinois Public Service Co. P.U.R.1916B, 177, where it has not applied for authority to increase its rates or for permission to discontinue and has not given reasonable notice to the public.

Service — telephones — extensions — operation at a loss — monopoly. That a telephone company will be required to extend service to localities whose inhabitants will otherwise be unable to transact business with the trade centers of the state is held in the Colorado case of Re Mountain States Teleph. & Teleg. Co. P.U.R.1916B, 169, where the utility enjoys a natural monopoly of the state, even though the extension investment will not immediately earn a fair return.

Set-off — claim not existing at beginning of action. That a counterclaim for conversion of property of a tenant upon re-entry by the landlord cannot be set up in an action on the lease for unpaid rent and waste, if the re-entry was justified and demand for the property converted was not made until after the commencement of the action, is held in Scott v. Waggoner, 48 Mont. 536, 139 Pac. 454, L.R.A.1916C, 491.

Set-off — counterclaim of tort in contract action. A counterclaim in tort for wrongful eviction by a landlord of his tenant and conversion of his property may be set up, it is held in Scott v. Waggoner, supra, in an action on the lease and the bond securing its performance, for rent unpaid and for waste, where by statute a counterclaim must be a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action.

Succession tax — devise in payment of services. A will was executed in 1901, bequeathing all the property of the testator to his niece, in pursuance of a contract entered into between them many years before, by which she agreed to live with and care for him as long as he lived. When he died, in 1911, the contract had been fully performed. It is held in State v. Mollier, 96 Kan. 514, 152 Pac. 771, annotated in L.R.A.1916C, 551, that the property passed by the will, and not by the contract, and is liable to the succession tax.

Taxes — foreign life insurance company. That the mere continuance of the obligation of existing policies in a foreign life insurance company, held by resident policy holders, together with the receipt of the renewal premiums upon these policies at the company's home office, may not be treated by the state as constituting in itself the transaction of a local business, justifying the imposition of an annual privilege tax upon the amount of the premiums so received, is held in Provident Sav. Life Assur. Soc. v. Kentucky, 239 U. S. 103, 60 L. ed. —, 36 Sup. Ct. Rep. 34, which is accompanied in L.R.A.1916C, 572, by a note on withdrawal or attempted withdrawal of foreign corporations as affecting the power of the state to exact a privilege tax.

Tradename — right to use one's own name. One doing business individually, it is held in the Oregon case of Wood v. Wood, 151 Pac. 969, cannot use his own name in combination with words indicating a firm or corporation which have already been adopted by another concern doing business in the same locality, although he adds his initials to the name adopted by him which do not appear in the name of his rival, if the result is to deceive the public as to the identity of the two concerns. Supplemental annotation as to the limitation of the right to use one's own name as a tradename accompanies this decision in L.R.A.1916C, 251.

Trover — conversion of bank draft. The president of a bank and the attorney for a county treasurer, who, after having secured from the bank a draft payable to the treasurer, to enable him to settle his accounts with the county, and after he has indorsed it to himself as treasurer, return it to the bank for cancelation, are held guilty of conversion in the Arkansas case of Hooten v. State, 178 S. W. 310, L.R.A.1916C, 544.

This seems to be the first case to pass upon the rights and liabilities of parties to paper used to enable an officer to settle his accounts.

Trover — liability of bank. A bank whose cashier, with knowledge of the shortage of a county treasurer, lends him a draft to enable him to settle his accounts with the county, is held guilty of conversion, in the Arkansas case of Hooten v. State, supra, if, after he has indorsed the draft to himself as treasurer of the county, he receives it back for cancelation without further indorsement.

Trust — following fund into the hands of receiver — operations of trust company. Creditors of one who placed his property in the possession of a trust company to be sold, and the proceeds dis-

tributed among such creditors, are held not entitled in Com. ex rel. Bell v. Tradesmen's Trust Co. 250 Pa. 378, 95 Atl. 577, L.R.A.1916C, 10, in case the trust company places money collected in a general account containing trust funds belonging to other persons, and becomes insolvent, to receive a preference in the distribution of any funds in such account, although an amount equal to or greater than that of the claimant was at all times on deposit until the trust company passed into the hands of a receiver.

Trust — property purchased with misappropriated funds. Real estate purchased by a clerk with his employer's funds, which he had misappropriated to his own use, is held impressed with a trust in favor of the employer in the Tennessee case of Preston v. Moore, 180 S. W. 320, L.R.A.1916C, 578.

Trust funds — trustee's estate — lien. Trust funds, it is held in State v. Bruce, 17 Idaho, 1, 134 Am. St. Rep. 245, 102 Pac. 831, L.R.A.1916C, 1, may be followed into the trustee's estate, although no particular property or asset can be identified as having been purchased or acquired by the particular funds, where it appears that the trust fund was mixed and commingled with the general funds and property of the trustee's estate, and went into the general assets, either in the purchase of paper and securities, or in the payment of the debts of the trustee; and in such case the lien of the cestui que trust will attach against the entire assets of the trustee's estate for the payment of such claim.

Valuation — reproduction cost new — full-service theory. That the reproduction cost new cannot be taken as the proper and equitable value for rate making on the theory that such cost is the amount which would necessarily be expended by a utility in duplicating its plant, and that, from a consumer's point of view, a well operated utility is delivering 100 per cent actual service and is hence in 100 per cent condition, irrespective of actual deterioration of the physical plant, is held in the Illinois case of Belleville v. St. Clair County Gas & Electric Co. P.U.R.1916B, 24.

Waters — riparian rights — removal of ore. The shore owner is held in State v. Korrer, 127 Minn. 60, 148 N. W. 617, 1095, to have well-defined riparian rights in the adjacent water of the lake and the soil under it below low-water mark. These rights include the right of access, the right to accretions and relictions, the right to wharf out, and the right, absolute as respects everyone but the state, to improve, reclaim, and occupy the surface of the submerged land out to the point of navigability for any private purpose.

But these rights are not unrestricted, but are subject to the control of the state. The state has power to conserve the integrity of its public lakes and rivers. The riparian owner has no right against the protest of the state to destroy the bed of a public lake for the private purpose of taking ore therefrom.

Supplemental annotation as to the ownership of the bed of lakes or ponds is appended to this case in L.R.A. 1916C, 139.

Will — repealing clause — effect of failure of bequest. A provision in a codicil revoking a bequest in the will for the purpose of devoting the fund covered by the bequest to charity is held in Melville's Estate, 245 Pa. 318, 91 Atl. 679, not to fall because of failure of the charitable bequest through death of the testator within the time required by statute to elapse between the will and time of death to make a charitable bequest valid.

The subject of revocation of a will as affected by the invalidity of some or all of the dispositive provisions of the later will is considered in the note appended to this case in L.R.A.1916C, 98.

Will — revocation — by will defectively executed. That a will defective because not having sufficient credible witnesses will not revoke a former will, although it expressly declares such intent, under a statute permitting a will to be revoked by another will in writing, declaring the same, signed by the testator in the presence of two or more witnesses, and by them attested in his presence, is held in Moore v. Rowlett, 269 Ill. 88, 109 N. E. 682, which is accompanied in L.R.A.1916C, 89, by a note on revoca-

tion of will by will defectively executed or one executed when testator is incompetent.

Witness — attorney — privilege. An attorney retained to represent certain persons in connection with investigations into election frauds, and who, at the instance of clients, appears for others actually indicted, and furnishes cash bail on their behalf, cannot be compelled, it is held in Ex parte McDonough, 170 Cal. 230, 149 Pac. 566, to testify without consent of the client as to who employed him to defend accused and furnish the cash for bail, under statutes making it his duty to maintain the confidence and preserve the secrets of his client, and forbidding him, without consent of the client, to be examined as to any communication made by the client to him.

The privilege of an attorney revealing the identity of his client is treated in the note appended to the foregoing case in L.R.A.1916C, 593.

Recent English and Canadian Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Bill of sale — failure to register — actual and continued change of possession — goods left in possession of bailee. There is no such "immediate delivery followed by an actual and continued change of possession" as to give the purchaser of property stored with a third person, who has taken a bill of sale thereof which he has failed to register, a right thereto superior to that of an execution creditor who seizes the property, where no notice of the sale was given to the bailee for more than a month, although before the seizure the purchaser exhibited the bill of sale to the bailee and arranged with him for the payment of storage charges. Mississquoi Lautz Co. v. North, 25 Manitoba L. R. 741, 25 D. L. R. 69.

Bills and notes — consideration — debt of infant. One who has given a promissory note to the vendor of a business purchased by an infant, who is threatening to rescind the sale if not paid, cannot escape liability thereon by claiming that he is but a surety for the payment of a legal debt of the infant, and that as there never was any legal debt there was never any liability on his part. Pearson v. Calder, 35 Ont. L. Rep. 524, 27 L.R.A. 337.

Chattel mortgage — security for existing and future indebtedness — effect of invalidity as to future indebtedness. A chattel mortgage given for the purpose of securing the payment of existing and also of future indebtedness, but which by reason of want of registration is invalid as against creditors and subsequent purchasers in so far as it purported to be a security for a future indebtedness, is nevertheless good as a security for the existing indebtedness. Hunt v. Long, 35 Ont. L. Rep. 502, 27 D. L. R. 337.

Contempt of court — threat to determine tenancy if tenant does not discontinue action. That a lessor does not commit a contempt of court in notifying a tenant who has brought an action to enjoin an alleged trespass on the demised premises, that if he does not discontinue such action his tenancy will be determined, where in doing so the lessor acts in good faith and because he believes the action to be detrimental to himself, is held in Webster v. Bakewell Rural Dist. Council [1916] 1 Ch. 300.

Husband and wife — action to restrain wife from purporting to pledge husband's credit. A husband may not enjoin his wife from pledging his credit where the common law has not been so altered by statute as to enable husband and wife to maintain actions against one another for tort. Webster v. Webster [1916] 1 K. B. 714.

Landlord and tenant — flat — duty of landlord to keep roof in repair. The lessor of a flat on the top floor of the

building, who retains possession and control of the roof, is under an absolute duty to keep it in repair, and is accordingly liable to the tenant for damages resulting from want of repair, irrespective of any negligence on his part. Hart v. Rogers [1916] 1 K. B. 646.

Marine insurance — injury to vessel in process of loading — Inchmaree clause. That an injury received by a ship while loading cargo in consequence of the breaking of tackle while a boiler was being lowered into the hold is not covered by a policy of insurance against perils "of the seas . . . and of all other perils, losses and misfortunes that have come or shall come to the hurt, detriment or damage of the said . . . ship, etc., or any part thereof," and including "the conditions of the Institute Time Clauses as attached," the seventh of which is generally known as the "Inchmaree" clause or condition, such condition not having the effect to extend the insurance to risks other than those specifically mentioned, although ejusdem generis therewith,—is held in Stott (Baltic) Steamers v. Marten [1916] A. C. 304.

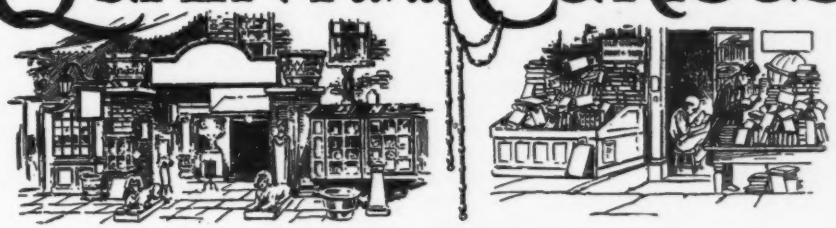
Partnership — effect of war between countries of members. The legal effect of an outbreak of war upon a partnership between two persons, each residing in the respective belligerent countries, is to dissolve the partnership. The relationship necessarily involves commercial intercourse in the closest degree, and such intercourse on the outbreak of war becomes illegal. Once such illegality has supervened, it is impossible for the relationship to continue to exist so as to be capable of being revived after the war. Hugh Stevenson & Sons v. Aktien-Gesellschaft für Cartonnagen-Industrie [1916] 1 K. B. 763.

Partnership — syndicate to purchase land — liability of member to account for profits made through exercise of option. One who, having secured an option for the purchase of certain land for a stated amount, gets others to join with him in its purchase, representing to them that the price of the land is a greater amount, is held in Powell v. Maddock, 25 Manitoba L. R. 730, 25 D. L. R. 748, to be bound to refund to a member of the syndicate his proportionate share of the excess. This result is put upon the ground that the principle that a partner is bound to account for a secret profit made in the partnership business applies as well to persons who have agreed to become partners. This case is of especial interest as being apparently at variance with the decision of the Ontario Appellate Division in Merriam v. Kenderdine Realty Co. 34 Ont. L. R. 556, heretofore noted in these columns (March, 1916).

Specific performance — contract involving title to land in another jurisdiction. That the Saskatchewan court will decree specific performance of a contract to exchange land in Saskatchewan, although to do so involves passing on the validity of the title to land situated in another jurisdiction which is tendered in exchange, is held in Tucker v. Jones, 8 Sask. L. R. 387, 25 D. L. R. 278, on the ground that in so doing the court does not make a decree against the foreign land, but decrees that upon its conveyance there will be a conveyance of the property within the court's jurisdiction.

Wills — residuary bequest — implied revocation by codicil. Re Stoodley [1915] 2 Ch. 295, 84 L. J. Ch. N. S. 822, [1915] W. N. 285, 59 Sol. Jo. 681, heretofore noted in these columns as holding that a codicil disposing of "the residue of my estate not bequeathed by the above will" for charitable purposes does not impliedly revoke a bequest of residue made by the will, but that its operation must be confined to such portion if any of the residue as should turn out not to have been effectually disposed of, has been reversed by the Court of Appeal in [1916] 1 Ch. 242, in which it was held that the legatee named in the codicil was entitled to the whole of the testator's estate undisposed of by legacies or specific bequests.

QUAINT and CURIOUS



One of the few, the immortal names,
That were not born to die.—Fitz-Greene Halleck.

An Object Lesson. Thomas M'Kean, one time governor of Pennsylvania, having vetoed what was deemed an important bill passed by the legislature, a committee of three of that body was appointed to wait upon his Excellency, to remonstrate with him, and to urge the reconsideration of the veto. He received them with his accustomed dignified politeness, and after they had explained the object of their mission, apparently without noticing their communication, he deliberately took out his watch, and handing it to the chairman, said, "Pray, sir, look at my watch; she has been out of order for some time; will you be pleased to put her to rights." "Sir," replied the chairman, with some surprise, "I am no watchmaker; I am a carpenter." The watch was then handed to the other members of the committee, both of whom declined, one being a currier, the other a bricklayer. "Well," said the governor, "this is truly strange!" Any watchmaker's apprentice can repair that watch; it is a simple piece of mechanism, and yet you can't do it! The law, gentlemen, is a science of great difficulty and endless complication; it requires a lifetime to understand it. I have bestowed a quarter of a century upon it; yet you, who can't mend this little watch, become lawyers all at once, and presume to instruct me in my duty." Of course the committee vanished, and left the governor "alone in his glory."—The Forum.

Speak Up, Please. Judge Crookham was one of the early lawyers of the state of Iowa. He was plain and homely in dress and manners, and delighted to represent the common people. He was not felicitous in speech, very absent-minded, and perpetually perpetrating bulls, at which, however he never laughed himself, because he never noticed them. Judge Lockridge related to me this incident, said Honorable Edward H. Stiles: His client's name was Fifield. After other witnesses had testified, he put his client on the stand, and with a wave of his hand said, "Now, Mr. Fifield, tell these hogs all you know about the jury."

Cultivate Wide Intellectual Interests. It has been said by a great authority that English lawyers, while in practice or in offce, devote themselves so exclusively to professional occupations that they are left without mental resources in their old age; and that consequently they waste their declining years in frivolous occupations or in vain regrets.

A story of Sir Samuel Romilly should be constantly remembered. A bishop traveling with him in his carriage noticed that it was filled with the best books of the general literature of the day. The bishop remarked that he was rejoiced to see that he found time for such reading. The answer was: "As soon as I found I was to be a busy lawyer for life, I strenuously resolved to keep up my habit of nonprofessional reading; for I had witnessed so much misery in the last years of many great lawyers whom I had known, from their loss of all taste for books, that I regarded their fate as my warning."—Law Times.

Quite Different. A tenant of Lord Halkeston, a judge of the Scotch court of sessions, once waited on him with a woeful countenance, and said: "My lord, I am come to inform your lordship of a sad misfortune. My cow has gored one of your lordship's cows, and I fear it cannot live." "Well, then, of course, you must pay for it." "Indeed, my lord, it was not my fault, and you know I am but a very poor man." "I can't help that. The law says you must pay for it. I am not to lose my cow, am I?" "Well, my lord, if it must be so, I cannot say more. But I forgot what I was saying. It was my mistake entirely. I should have said it was your lordship's cow that gored mine." "Oh, is that it? That's quite a different affair. Go along, and don't trouble me just now. I am very busy. Be off, I say!"—Am. L. Rev.

E Pluribus Unum Forever. Mass Jones, an old-time Iowa lawyer, had a case before a justice of the peace out in the country, states Honorable Edward H. Stiles. He was for the defendant, while a wiseacre of a schoolmaster, who had picked up a few Latin words, appeared for the plaintiff. The facts were all in his favor, and in summing up the different groups, in his argument, at the end of each peroration he would exclaim with great gusto," and that is the summum bonum of the matter, and the case must go to the plaintiff." Mass had really no defense, but his ready wit and keen sense of the ridiculous supplied him with one. So when he came to reply, he said to the justice, "I have a great regard for that old law of summum bonum, on which the gentleman wholly relies, for its antiquity. It was an old English law, and served well its day and generation in ancient times. But the people finally outgrew and became dissatisfied with it; and it was one of the laws England tried to force upon the Colonies. But, "said Mass, raising his voice and arm, "Our forefathers fought and spilt their blood in the Revolution to overthrow that law, and they did overthrow it, and reared in its stead the law of E pluribus unum, which must govern this case." Thereupon the justice, who was an Irishman, by the way, said, "I have a great deal of respect myself for that old English law of summum bonum. It was good enough for that time, and was good enough for the English, but I agree with Mr. Jones that our forefathers tumbled that law over in the Revolution, and this case will be decided in favor of the defendant under the law of E pluribus unum which was put up in its place."

A Judicial Quære. It is said of Chief Justice Tilghman of Pennsylvania, that he had a great regard for a dignified administration of justice; "and the only time," writes David Paul Brown, "that we ever observed him to be disconcerted upon the bench was upon one occasion when, the business of the day having terminated, his associates arose suddenly, and were walking off without a formal adjournment, when, turning to them, with his usual modesty, but with some evidence of mortification, he said, "Gentlemen, shall we adjourn, run away, or resign?"

Use of Classic Models. The famous lawyers of the past, Mansfield and Erskine, Brougham and Romilly, recognized that no man could be a good advocate who was not also a good speaker, and they believed in the study of oratory. Romilly, like many other great jurists, was a great admirer and student of Cicero. The great lawyers of the eighteenth century knew where to go to learn their business. They were not satisfied with the cheap fluency and common-place diction of the debating societies. They wished to be eloquent, and they went to the fountain head of Roman oratory. Romilly read the whole of Cicero, with the exception of one or two treatises. He studied and translated the most celebrated of his orations, his *Laelius*, his Cato *Major*, his treatise *De Oratore*, and his *Letters*. He also read the whole of Livy, Sallust, and Tacitus. He read Terence, Virgil, Horace, Ovid, and Juvenal again and again. To improve his style he translated almost all the speeches in Livy, the whole of Sallust, and much of Tacitus. With the same object of improving his style, he

read and studied the best English writers, Addison, Swift, Robertson, and Hume, noting down every peculiar propriety and happiness of expression which he met with, and which he was conscious that he should not have used himself. He was a careful student of Bolingbroke, and expressed the opinion that, if his delivery was equal to his style, as Lord Chesterfield said it was, he was, at least, capable of rivaling Cicero. He endeavored also to acquire much general knowledge. He read a great deal of history. He wrote political essays, and used to send them anonymously to the newspapers. He was anxious to acquire facility of elocution, but, instead of resorting to debating societies, he adopted an expedient suggested in Quintilian. He cultivated the habit of expressing to himself, in the best language he could, whatever he had been reading. He used the arguments he had met with in Tacitus and Livy, and mentally composed with them speeches of his own. Occasionally, too, he attended Parliament, and used to recite or answer in thought the speeches he had heard there.

The reward of all Romilly's labor came in his later years, when he was universally recognized as an orator of the first distinction. J. A. Lovat-Fraser in Law Magazine and Review.

Lord Brougham's Imitation of Cicero. It has been stated that Brougham greatly admired Cicero. He had the Roman always before his eyes. Lord Durham nicknamed him Cicero Brougham and Vaux. He even adopted pedantic Ciceronian phrases, like "much meditating," in imitation of the Roman orator. "I was amused," wrote Cobden to Chevalier in 1861, "at your diplomacy in comparing Brougham to Cicero. This must have delighted him. He has, I suspect, always had the great Roman in his eye." Brougham particularly admired and sought to imitate the universality of Cicero's accomplishments. In his own case this led to superficiality and shallowness, and ultimately damaged his reputation and fame. "It is this attempt at universality," says Cobden, "which has been the great error and failing of Lord Brougham's public life. He has touched everything and finished nothing."—Law Magazine and Review.

An Untoward Accident. During the speech of Patrick Henry upon the subject of British taxation and aggression, we are informed that in a transport of passion he tore off his wig, and in suddenly attempting to replace it, put it wrong side foremost. We may well laugh at the cold description of the occurrence, when the perilous occasion has gone by; but wigs were no laughing matters when heads were in danger.

Oh, for Sir Walter Raleigh! There are many interesting references to Lord Campbell scattered about in the memoirs and biographies of his contemporaries. He was a man who inspired strong likes and dislikes. The famous Dr. Kenealy hated him. He declared that Campbell found luxury in the infliction of torture, and had a rat-like, cruel look on his face, which settled immovably as the judge got older. The following reminiscence of Dr. Kenealy is remarkable:

"I remember an incident which shows, although only in a slight degree, his natural lack of courtesy and consideration. A number of ladies crowded into one of the passages of Westminster Hall for the purpose of getting a glimpse of the Lord Chief Justice, who was then a celebrity of some note. As he passed, his button caught in a beautiful lace bertha worn by one of his fair admirers. After a vain struggle to disengage himself, Campbell deliberately took out his penknife—everybody thought for the purpose of cutting off his button and releasing the lady. Not at all. He coolly cut a hole in her handsome lace, and passed on with his sweetest smile."—Law Magazine and Review.

Under Oath. Dr. Mead of Yankton, South Dakota, is an eminent alienist. He was called as an expert witness in a certain case, and was asked who, in his opinion, was the greatest alienist of modern times; and he answered, giving the name of a certain man now deceased.

"But," said the lawyer. "Who is the ablest living alienist?"

"I am," replied Dr. Mead.

After he was excused from the witness stand a friend chided the doctor on his statement as an expression of vanity.

The doctor's eyes twinkled.

"Vanity nothing," replied the Doctor, "Wasn't I under oath?"

Military Honors an Essential Preliminary. Not so very long ago, quite a commotion occurred in one of our southwestern states, due to the fact that the legislature had passed a law which prohibited the sale or giving away of any concoction which contained ardent spirits. One of the former statutes had made possession of a government liquor license prima facie evidence of a sale. One oldtimer had been arrested and tried time and again, and turned loose an equal number of times on the defense that he had not sold liquor, but had given it away. Finally, the prosecuting attorney asked him what he was doing with a United States government license which authorized the sale, and he said he didn't like to take the chances with the Federal government that he had to take with the state. About this time, the law was passed which prohibited the giving away of alcoholic throat panaceas. Then the defense was invented in this particular state, by which, if the defendant was able to show that less than a given per cent of alcohol was contained in the concoction, it was no offense. I was at that time one of the officers of the court, and accidentally overheard a conversation which to me was intensely ludicrous. I was sitting near a spring in the park when a young gawky farmer came along, and this dialogue followed:

"Hen, did yer git that 'ar alkerhaul frum Paydukay?"

"Yaas."

"Gimme yer bottul."

"Nope. You can't drink outen ther bottul. Git yer a kup and mouten ni fill hit with spring water and I'll giv yer a few draps. It's agin the law to give hit away raw. It has to be dang well saluted."—S. M. Wassell.

A Way Out. Habits of observation are valuable sometimes, writes Thomas Fitch of the Los Angeles Bar. I once earned a fee of $3,000 just by noticing something. An Arizona capitalist and real estate speculator owned $100,000 worth of lots in a thriving city in that territory. They were mortgaged for $50,000 to a San Francisco bank. The bank busted and the receiver commenced suit for foreclosure. The defendant was unable to pay, and was in danger of losing the property. The Arizona Code contained a peculiar provision copied from the Texas Code, which allowed a defendant to plead a counterclaim acquired by him after suit was commenced. The law in other states was that a counterclaim could not be pleaded unless it existed in favor of the defendant before complaint was filed.

"I said to the defendant's attorney, 'If your client will pay me $3,000, I will show him how to save $30,000.' 'How will you do it?' said he. 'If I tell you,' was my reply, 'you will know as much as I do. My information will be worth $30,000 to your client. $3,000 is a modest fee under the circumstances.'

"He agreed with me. He communicated with his client, who accepted my proposition.

" 'The certificates of deposit of the plaintiff,' said I, 'are offered without takers at 20 to 25 cents on the dollar. Buy up enough of them to cover the $50,000 mortgage, plead them as a counterclaim on the action, and there you are.'

"My advice was followed, and the property was cleared. I had only the verbal promise of the defendant for my $3,000, but he paid it promptly, like the dead game sport he was.

"What did I do with the fee? Oh ask me something easy. It went into a hole in the ground. The hole promised to make me a millionaire, but it lied, as mining holes often do."

New Books & Periodicals

Knowledge is now no more a
fountain sealed:
Drink deep.—Tennyson.

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This work is uniform in appearance and excellence with the earlier volumes of the series.

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This is a book for the political economist, the sociologist, and criminologist. Many lawyers may disagree with the author's conclusions as to causes of crime; but all will find his work thought-provoking and instructive.

"The Gist of Real Property Law." By Harold G. Aron (Writers Pub. Co., 20 Vesey St., New York) —.

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"The Brief with Selections for Briefing." By Carroll Lewis Maxcy, M. A. (Houghton, Mifflin Co., Boston, Mass.) $1.25.

The author of this volume is Morris Professor of Rhetoric in Williams College. His experience in the college classroom demonstrated to him the high degree in which careful and logical methods of thought on the part of the student are developed by the analysis demanded by the process of brief-construction. His work provides material suitable for exercises of this character, and sets forth the principles underlying the argumentative brief as a form of composition.

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Shakespeare.
"Shakespeare v. Bacon,"—23 Case and Comment, 56.
Slaves.
"Old Slave Laws of Georgia."—23 Case and Comment, 7.
Trade Commission.
"The Federal Trade Commission Law."—8 Lawyer and Banker, 414.
Trusts.
"Notes on the Strict Interpretation of Ecclesiastical Trusts."—36 Canadian Law Times, 190.
Uniform Legislation.
"The Necessity for Uniformity in State and Federal Banking Laws."—3 Virginia Law Review, 522.
"Uniformity of Law in the British Empire."—36 Canadian Law Times, 298.
Weights and Measures.
"Power of Municipality to Regulate Weights and Measures."—23 Case and Comment, 11.
Wills.
"So Long as She Remains My Widow."—23 Case and Comment, 29.
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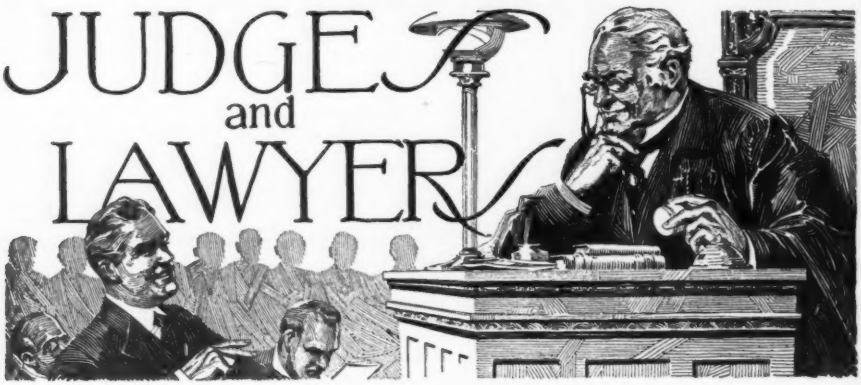
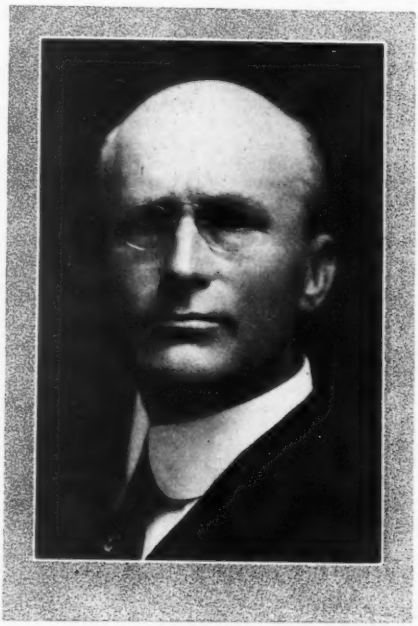


A Record of Bench and Bar

Thomas Wall Shelton

A Specialist in Judicature

MR. SHELTON was educated at public and private schools, at Denna's Preparatory School at Cranstons, New York, Virginia Military Institute, and Washington and Lee University, at which latter he took the degree of Bachelor of Law in June, 1893, making the course in one year. He was called to the bar of the city of Norfolk in the fall of that year. In June, 1894, nine months afterwards, he was elected city attorney in a popular revolt against unsatisfactory political conditions, retiring from politics at the end of an exciting and militant term, but he has always maintained a lively interest in public and charitable affairs. He is at present Judge Advocate General of Virginia, and he served seven years on the Board of Visitors of the Virginia Military Institute. He represents Virginia in the General Council of the American Bar Association, is chairman of its committee on uniform judicial procedure, and chairman of the Virginia Bar Association's committee on reform of judicial procedure. He has been made an honorary member of many commercial and civic organizations in recognition of his efforts to modernize the courts. Since retiring from public office, his whole time has been devoted to general practice, specializing in constitutional and corporate law and statutory liens. Always a hard worker,—and it is estimated that he actually labors fifteen hours a day,—he withdrew from all social activities eight years ago, and has since devoted much time



to the study of constitutions and the history and philosophy of government. Specializing in judicature, he has made many contributions on this subject to magazines and in public addresses throughout the country. His argument before a subcommittee of the judiciary committee of the United States Senate, on "the Relation of the Judge and Jury" under the Constitution, was made a public document, and was adopted by the committee of the New York State Bar Association. It is believed to have played a part in defeating a statute proposing to deprive Federal district judges of the power to "sum up the evidence" and to instruct a verdict in proper cases.

Convinced that, without greater uniformity of law, states' rights must be materially and unnecessarily sacrificed in the interest of interstate commerce, and that there could be no uniformity of law in the absence of uniformity of decision and of procedure, he has been ten years engaged in the effort to make both possible.

Mr. Shelton has been appropriately referred to as the "Father of the Conference of Judges." His doctrine is that fixed interstate judicial relations are as necessary and logical and easy of achievement as interstate commercial relations. To this end he conceived the idea of an annual conference of the chief justices of the several state supreme appellate courts and the senior Federal circuit judge of each circuit, or a representative. Although the idea met with universal approval, there was little faith in its consummation. A very able lawyer declared it to be the idle dream of an earnest enthusiast. Starting a campaign before the Republican Club of the city of New York seven years ago, Mr. Shelton wrote and spoke all through the country in its advocacy. The officers of the American Bar Association espoused the cause, and a preliminary conference finally held in Montreal in August, 1913, was well attended. A permanent organization was effected, now known as the "Judicial Section" of the American Bar Association. It is one of the most interesting departments of that great organization. This meeting will, no doubt, take as prominent a place in judicial history as the famous Mount Vernon Conference did in commercial legal history, for the latter led to fixed interstate commerce law.

In 1914 he celebrated the first anniversary of the Montreal Conference of Judges by giving a state dinner at the University Club in Washington, D. C. to those chief justices and Federal circuit judges who participated. There were present many lawyers of national reputation, as well as Mr. Justice McReynolds, Attorney General Gregory, and Solicitor General Davis, who gave the movement the sanction of their personal and official approval. An annual banquet is now a feature of the judicial conference.

Seeing that there could be no uniformity in procedure in the Federal plan of conforming to state practice and procedure (§ 914, Rev. Stat.); believing that the courts should be regulated by court rules instead of rigid, unscientific statutes; and that there should be an equable division of power between the legislative and judicial departments,—he organized the present campaign of the American Bar Association, looking to the repeal of all Federal laws regulating procedure, and the enactment of a simple statute vesting in the Federal Supreme Court the same power over the law side that it has always possessed on the equity side of the Federal courts. The adoption of the system of rules proposed to be prepared by the states would bring about uniformity. Besides the American Bar Association and many national, commercial, and civic organizations, over forty state bar associations have indorsed the program. He is chairman of the American Bar Association's committee having this campaign in charge, the other members being Ex-President Taft, Ex-Secretary of War Jacob M. Dickinson, Lawrence Maxwell, of Cincinnati, and Joseph N. Teal, of Oregon.

In the interest of an elastic Federal judicial system he advocates power in the Supreme Court to detail both circuit and district judges to duties in any circuit or district in order to prevent congestion of any docket occasioned by an increase of litigation or troubles person-

al to the local judge. "In perfecting judicature the prime thought should be the interest of commerce, to serve which the courts were created. Local traditions and customs and the personal comfort of judges must give way to a business-like administration of justice."

He conceived the idea of a "judicial court of inquiry" as a means of forestalling the sporadic demand for the recall of judges and a recurrent opposition to life tenure, as well as a splendid preventive remedy.

"Impeachment," said he, "as important as is the virile maintenance of the present constitutional provision, should not be the only way of bringing a life tenure judge before the bar of public opinion. It is too often the case that the layman through ignorance of the law, and the lawyer through indifference or fear, has reached the conclusion that a life tenure judge is out of reach of the man without influence and means. This is because of the lengthy and expensive dual constitutional scheme. Resentment and opposition to life tenure and the incentive to recall were obvious results. A 'judicial court of inquiry,' the prototype of which may be found in military law, offers hope of a solution. A judge himself may request the court, or when, in the opinion of the chief justice sufficient cause is shown, the court could be convened. The personnel should be such that no member could possibly profit by its finding, and it should represent the different grand divisions of the country. Charges and specifications should be prescribed in advance, so as to prevent surprises, but the entire fitness of the man to be a judge should be examined. The usefulness of a judge is destroyed long before he sinks to the depths of high crimes and misdemeanors. Before such a court there could be defined and considered the trinity of evils that destroy the usefulness of judges,—corruption, ignorance, and subserviency, as well as inefficiency. This court could not impeach, but the practical result would be the same. But if nothing else were accomplished, the effect would bring to the great body of the people the consoling and peaceful thought that an improper judge was speedily within their reach. The expense of the court would be negligible, its composition ideal, its effect as wholesome as its prototype in the Army and Navy, and there would follow a peace and contentment that is the concomitant of faith and respect and consciousness of the power of self-protection."

He advocates higher pay, life tenure, and pensions as conditions to an efficient and independent judiciary. He believed that as the courts reflect the very genius of a government, the permanency of government depends upon the trinity of faith, respect, and obedience of a people to the courts.

Five years ago he commenced a campaign to abolish the common-law pleading, for all past time in vogue in Virginia, and was chairman of the State Bar Association's committee. After encountering many obstacles and personally financing the campaign, the last legislature unanimously adopted the entire program of court rules. Virginia's action will, no doubt, exercise a potent influence in other states.

He is a life-long Democrat in politics, but a conservative progressive in all governmental relations. He is an unyielding opponent of free silver and the recall of judges and judicial decisions. He believes in a representative government as defined by Montesquieu, and takes no stock in social democracy. He studied the Constitution under John Randolph Tucker at the time that great scholar and apostle of states' rights was writing his book on the subject, and is a contemporary of Solicitor General Davis and Secretary of War Baker at Washington and Lee University.

Mr. Shelton is forty-four years old and a bachelor. He is now engaged upon a book on the subject of American judicature, made up of a revision of his addresses and magazine articles, which will go to press in the fall.

Roscoe Pound

Dean of the Harvard Law School

BY LAWRENCE B. EVANS

of the Boston Bar

THE election of Roscoe Pound of the office of dean of the Harvard Law School brings to the head of that important institution a man of unusual equipment and varied experience. As a practitioner and as a judge he has had a part in the actual application of the law under present-day conditions. As a teacher he has made a careful analysis of its principles, and as a writer he has made notable contributions to legal literature. It may be questioned whether any other member of the American bar is exerting so strong an influence upon the shaping of American law and the moulding of opinion upon legal subjects, especially among lawyers, as is the new dean. It is a matter of congratulation, not only to the circle immediately concerned but to all who are interested in the development of the law, that the commanding post of dean of the Harvard Law School should be conferred upon a man who has touched the subject at so many points, and who has demonstrated that he possesses an exceptionally constructive mind.

Roscoe Pound was born at Lincoln, Nebraska, October 27, 1870. He was prepared for college by his mother, and was graduated from the University of Nebraska in 1888. After a year at the Harvard Law School he was admitted in 1890 to the bar of Nebraska, and practised at Lincoln until 1907, except during the years 1901–03 when he was commissioner of appeals of the supreme court of Nebraska. From 1899 to 1903 he was assistant professor of law in the University of Nebraska, and from 1903 to 1907 he was dean of the Law School. From 1904 to 1907 he was the Nebraska Commissioner on Uniform State laws. From 1907 to 1909 he was professor of law in Northwestern University, and in 1909–10 he held a similar post in the law school of the University of Chicago. In 1910 he became a member of the faculty of the Harvard Law School, first as Story professor of law, and since 1913 as Carter professor of jurisprudence. In February, 1916, he was elected dean of the Law School. Throughout these years of activity as a practitioner and teacher he has been a voluminous contributor to the legal periodicals. To rehearse even the titles of his numerous articles would require more space than is available.

In the midst of this busy career as a lawyer, Mr. Pound has found time for extensive study in the natural sciences, which has brought him recognition as an eminent botanist. From 1892 to 1903 he was director of the Botanical Survey of Nebraska, and with Dr. F. E. Clements he has published the Phytogeography of Nebraska, as well as many monographs and articles in European and American botanical journals.

The outward events of Mr. Pound's life and the record of the contributions which he has made to legal and scientific literature are of less interest in connection with the new duties which he is about to assume than are the principles which in his judgment should govern the development of the law in the immediate future, and which because of his advocacy are likely to play an important part in the training of the students in the Harvard Law School while he remains at its head. Without going too far into details, one or two general statements may be made.

Mr. Pound is more than a lawyer. He is a jurist. This necessitates a comparative study of the legal ideas of many peoples who have attempted to solve sim-

ilar legal problems by different methods. Too often scholars of great ability, who were profoundly versed in the history and doctrines of the common law, have taken a certain pride in their ignorance of other legal systems. From this smug self-sufficiency Mr. Pound is entirely free. Nothing is more characteristic of his writings upon legal subjects than the wide use which he makes of the thoughts and experiences of people living under other legal systems. While he is not likely to lose sight of the fact that the object of the Law School is to train men in the common law, we may expect that under his guidance other legal systems, particularly the Roman, will not be so completely ignored as they have been heretofore. A second general observation which may be made as to Mr. Pound's outlook upon the law is his appreciation of the fact that the common law is now going through a period of transition quite comparable in importance with those associated with the rise of equity and the absorption of the law merchant and the legislative activity of the nineteenth century. Of this movement in the law, Mr. Pound says: "Its watchword is satisfaction of human wants, and it seems to put as the end of law the satisfaction of as many human demands as we can with the least sacrifice of other demands. This new stage of legal development may be called the socialization of law." In another place he says: "The law will absorb the new economics and the new social science, and will be made over thereby. Indeed, the process of absorbing this new element is going on, and is beginning to go on quite as much through judicial decision as through legislation. . . . Socialization of our legal tradition is as inevitable as were the successive liberalizations in the past by equity, by the law merchant and by legislative reform. . . . An age that promises to rival the age of Coke and to surpass the age of Mansfield as a constructive epoch in legal history invites to labor along new lines." To many disciples of the common law Mr. Pound's criticisms of that system, and his insistence upon the necessity of adapting the law to the social requirements of the time may savor of a dangerous radicalism. Such persons may look with alarm upon his appointment to the most important post in the American system of legal education. If so, their fears will be largely allayed by a passage in an address which Mr. Pound delivered in 1912:

ROSCOE POUND.

"Let me make it clear that I do not urge that we overhaul our law-school curricula overnight. Nor do I urge that we add new courses to our curricula, already overburdened for the time allowed. I would urge rather a progress in our thinking, and thence in time in our teaching; a study of system of the law as a whole, and a fitting of the principles established by enacted law into the system; a study of the relations of the traditional and the imperative elements of law and working out of better doctrines with respect thereto, and of theories more in accord with the conditions of a period of legislation and the demands of social

progress; and finally, a study of the principles and policy of modern law-making, of the purposes and ends of law to-day as a means of social progress—all these in the same spirit and with the same zeal wherewith we have studied the principles of the common law, discovered the spirit of our legal tradition and wrought system in particular departments of the common law in the past. When we have done this studying and have achieved results along these lines in the daily battle of wits in the classroom with respect to our courses as they now stand, we may be ready to add new courses or to rearrange curricula."

Mr. Pound's appointment as Dean of the Harvard Law School is ample assurance that the men who resort to that institution for instruction will have their thoughts directed to the new demands which society is making upon the law and the methods by which those demands can be satisfied.

Death of Pioneer Jurist.

L. B. Nash, 78 years old and for seventeen years a resident of Spokane, died at his home on May 25 of abdominal trouble. Five of his six children were at his bedside. He located in Walla Walla in 1873, in Seattle in 1876 and in Spokane in 1879. He was judge of the supreme court of the territory of Washington from 1888 until the state was admitted to the Union. According to friends he was the oldest practising attorney in point of time in Washington.

Decease of Prominent New Jersey Lawyer.

Albert Asa Wilcox, who was law partner of the late Vice-President Garret A. Hobart, and president of the Passaic Print Works, of Passaic and New York, died on Sunday night at his home, 387 12th Avenue, Paterson, aged fifty-five years. He studied law in the office of Vice-President Hobart, and became his partner when he was admitted to the bar. The partnership continued until Mr. Hobart died in 1899.

Mr. Wilcox, who was born in New York, was one of the most widely known members of the Passaic County Bar Association. He took an active part in all civic reform movements in Paterson, and served six years on the Park Commission. He was a charter member of the Hamilton Club, also a member of the Arcola Country Club, the Union League of New York, and a captain of the old Paterson Light Guard, under the late Gen. Joseph W. Congdon. Mr. Wilcox is survived by his wife and one daughter.

Able Seattle Lawyer Suddenly Stricken.

John Kelleher, a member of the law firm of Wright, Kelleher & Allen, and one of the most highly regarded members of the Seattle Bar Association, died on May 16.

He was operated upon at the hospital for appendicitis where he was taken as soon as he fell ill. His family was at the bedside when the end came.

News of Mr. Kelleher's death created the most profound grief among members of the King county bench and bar Tuesday, and judges and attorneys were outspoken in their regret at his passing. Due to his insistent attempts at self-effacement and avoidance of public attention, Mr. Kelleher, though a brilliant attorney, was known better by members of his profession than by the community generally.

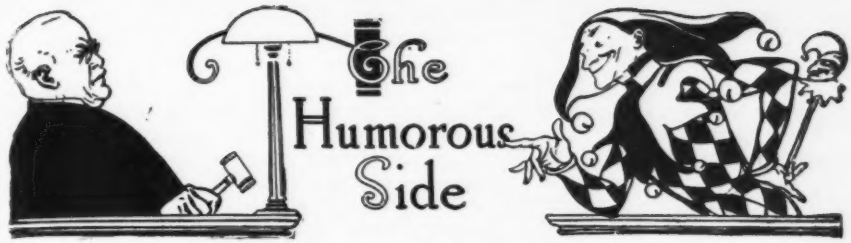
Mr. Kelleher was born January 8, 1864, near Fenton, Livingston county, Mich. He graduated from the law class of the University of Michigan in 1891, and came to Seattle a few weeks after graduation, being admitted to practice in King county the same year. In 1899 he formed a partnership with George E. Wright, under the name of Wright & Kelleher, which firm later changed to Wright, Kelleher & Caldwell, and changed this year to Wright, Kelleher & Allen, when Corporation Counsel Hugh M. Caldwell left the firm.

"Mr. Kelleher occupied an almost unique position in the esteem of attorneys in this state," said Judge Dykeman. "During the fourteen years I have known him I have never heard a man speak an ill word of him."

Robert E. Lee Saner

ROBERT E. LEE SANER, senior member of the law firm of Saner, Saner, & Turner, was born on a farm near Washington, Arkansas, in 1871. His father was John Franklin Saner, a farmer and merchant; his mother was Susan Crawford Saner (*nee* Webb). His father's forebears hailed from Switzerland, one branch settling in Pennsylvania, the other at Salem, North Carolina. The Winston College for women, in the latter city, was founded by the Swiss settlers. His mother sprang from English and Irish ancestors, who originally settled in North Carolina, moving thence to Mississippi, and thence to Tennessee. Mr. Saner was educated in the public and high schools of his native state, at Searcy College, Arkansas, and at Vanderbilt University, Nashville, Tennessee. He is also a graduate of the Law Department of the University of Texas, taking the degree of L.L.B. in 1896. Mr. Saner taught school during the summer vacation, while attending Searcy College, his summer vacations while at Vanderbilt University being spent as traveling representative of Belmont College a young ladies' school in Nashville, Tennessee. Immediately after leaving the University of Texas, Mr. Saner began the practice of law in Dallas, which has proved lucrative from the start. He has been special attorney for the University of Texas for the past sixteen years, and has handled that institution's large landed endowment with marked ability. He also has been receiver for valuable properties, by appointment of the courts, at various times, while his civil law practice has imposed active participation in litigation that has yielded large fees. Mr. Saner was elected by the Texas Bar Association as one of the delegates to the Universal Congress of Jurists and Lawyers, which met at St. Louis, in 1904. He was secretary of the State Democratic Executive Committee from 1899–1900, and has been honored in various other ways politically. Mr. Saner's wide interest in life and numerous activities are shown by the fact that he is vice chairman of the executive committee of the Southern Traction Company; director and member of the executive committee of the Security National Bank; worthy high chancellor of the Alpha Tau Omega Fraternity; member of the M. E. Church South, of the Dallas Club, and the Lakewood Country Club; life member of every Masonic body, both York and Scottish rites, Knight Templar, 32d degree, and Shriner. He is a member of the general council of the American Bar Association, and was president of the Texas Bar Association in 1911.

We are indebted for biographical data to a sketch of Mr. Saner which heretofore appeared in the Successful Magazine.



O' then a laugh will cut the matter short:
The case breaks down, defendant leaves the court.—Horace.

Took a Chance. The late Eugene F. Ware had filed a demurrer, and was arguing the case before Judge Samuel F. Miller. The latter stopped counsel with the remark: "Mr. Ware, there is no use taking up any more time of this court. Why, that question has been decided against you by every court in Christendom."

"Oh, yes," replied Mr. Ware, in his genial and pleasant way, "I am aware of that, your Honor, but I know your Honor occasionally makes decisions contrary to every court in Christendom, and and I thought perhaps this would be one of the times."

"Go on, Mr. Ware, go on, sir, I will hear you. Go on, sir."

A Candid Judge. A New England attorney tells a story in which figures H. L. Dawes, who, it seems, in his younger days was an indifferent speaker. Shortly after his admission to the bar, he had a case which was tried before a justice of the peace in North Adams, Massachusetts, and was opposed by a lawyer whose eloquence attracted a large crowd.

The justice was perspiring in the crowded room and evidently fast losing his temper. Finally he drew off his coat, and, in the midst of the eloquent address, burst out:

"Mr. Attorney, supposing that you take a seat and let Mr. Dawes speak. I want to thin out this crowd."

Objected To. Samuel Chase, of Maryland, one of the signers of the Declaration of Independence, a man of ripe legal learning, but of a lofty and most despotic spirit, became an associate justice in the year 1796.

An important case was before the court, in which a learned gentleman by the name of Samuel Leake, from Trenton (in an adjoining state), was engaged. Mr. Leake was remarkable, generally, for the number of authorities to which he referred, and upon this occasion he had brought a considerable portion of his library into court, and was arranging the books upon the table at the time the judge took his seat; when the following laconic colloquy took place:

Judge Chase.—"What have you got there, sir?"

Leake.—"My books, sir."

Chase.—"What for?"

Leake.—"To cite my authorities."

Chase.—"To whom?"

Leake.—"To your Honor."

Chase.—"I'll be d——d if you do."

Held Down His Job. Sir George Rose had a friend who had been appointed to a judgeship in one of the colonies, and who, long afterwards, was describing the agonies he endured in the sea passage when he first went out. Sir George listened with great commiseration to the recital of these woes, and said, "It's a great mercy you did not throw up your appointment."—American Law Review.

Would Fight for Him. Amongst O'Connell's professional reminiscences was the following unique instance of a client's gratitude. He had obtained an acquittal, and the fellow, in the ecstacy of his joy, exclaimed, "Oh, counsellor, I've no money here to show your Honor my gratitude, but I wisht I saw you knocked down in my own parish, and maybe I wouldn't bring a faction to the rescue."—Law Times.

Their Fate. Lord Chief Justice Holt, when young, was very extravagant, and belonged to a club of wild fellows, most of whom took to an infamous course of life. When his lordship was engaged on a certain occasion at the Old Bailey, a man was tried and convicted of a robbery on the highway, whom the judge remembered to have been one of his old companions. Moved by that curiosity which is natural on a retrospection of past life, and thinking the fellow did not know him, Justice Holt asked what had become of such and such of his old associates. The culprit, making a low bow, and fetching a deep sigh, said, "Ah, my lord, they are all hanged but your lordship and I."

An Explanation. Chief Justice Marshall was riding one morning to court, in his single carriage, when his horse fell and broke a shaft. He was puzzled what to do. Tom, a neighboring negro wagoner, happening to drive up, he asked him if he could help him out of his difficulty. "Oh yes, massa, if you'll lend me your knife." Tom took the knife and cut a sapling pole and a grape vine from a neighboring thicket, with which he speedily spliced up the broken shaft. "Now, Tom," said the judge, "why didn't I think of that?"

"Oh, massa," replied Tom, "you know dat some people will have more sense den oders!"

A New One. A maxim of the law should be, "He who cannot explain is lost."

No Inducement. Hugh Henry Breckenridge, of the supreme court of Pennsylvania, was by no means deficient in firmness and fortitude. His laborious youth, his self-sacrificing and persevering industry, in a word, give abundant evidence of the indomitable will. But though possessed of courage, his disposition was to avoid quarrels of all kinds; he abhorred dueling, and always preferred wit to bravery. Having, during the Revolutionary War, severely lampooned General Lee (at that time one of the ruling though discontented spirits of the American Army), he was hotly pursued by the irritated officer, for the purpose of personal chastisement. The judge, however, succeeded in reaching his house, and entering and locking the door, he rushed up stairs and looked out of the window upon his enraged pursuer. "Come down, sir," said the General, "and I'll give you a cowskinning!" "I won't," was the ready reply, "if you'll give me TWO!"—The Forum.

Lamming Counsellor Lamb. Counsellor Lamb, an old man when Lord Erskine was at the height of his reputation, was a man of timid manners and nervous temperament, and usually prefaced his plea with an apology to that effect. On one occasion, when opposed to Erskine, he happened to remark that he felt himself growing more and more timid as he grew older. "No wonder," replied the witty, but relentless barrister, "everyone knows that the older a lamb grows, the more sheepish he becomes."

One On His Lordship. Lord Kenyon was conspicuous for economy in every article of his dress. Once, in the case of an action brought for the nonfulfilment of a contract on a large scale for shoes, the question mainly was whether or not they were well and soundly made and with the best materials. A number of witnesses were called, one of whom, being closely questioned, returned contradictory answers, when the Chief Justice observed, pointing to his own shoes, upon which was a broad silver buckle: "Were the shoes anything like these?" "No, my lord," replied the witness; "they were a great deal better and more genteeler." The court was convulsed with laughter, in which the Chief Justice heartily joined.

Suaviter in Modo. Enoch Eastman, an old time Iowa lawyer, on one occasion, appeared before a young judge, and to enforce a point he desired to make, brought with him and attempted to read Blackstone to the court, whereupon the young judge, after moving uneasily about in his seat for a while said, "Mr. Eastman, I've read Blackstone." "Oh, hev ye!" responded Enoch, looking at the judge over the top of his spectacles with an air of surprise.